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No. 10-857

Supreme Court, U.S.
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In The Supreme Court of the United States

COUNTY OF ORANGE [CALIFORNIA],
HELEN DWOJAK and MARCIE VREEKEN,

Petitioners,

v.

DEANNA FOGARTY-HARDWICK,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Fourth District, Division Three

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTORY PROVISIONS INVOLVED

In addition to the statutes Petitioners identified, California Government Code §820.21 provides in pertinent part:

> (a) Notwithstanding any other provision of the law, the civil immunity of juvenile court social workers, child protection workers, and other public employees authorized to initiate or conduct investigations or proceedings pursuant to Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code shall not extend to any of the following, if committed with malice:
>
> (1) Perjury.
>
> (2) Fabrication of evidence.
>
> (3) Failure to disclose known exculpatory evidence.
>
> (4) Obtaining testimony by duress, as defined in Section 1569 of the Civil Code, fraud, as defined in either Section 1572 or Section 1573 of the Civil Code, or undue influence, as defined in Section 1575 of the Civil Code.
>
> (b) As used in this section, "malice" means conduct that is intended by the person described in subdivision (a) to cause injury to the plaintiff or despicable conduct that is carried on by the person described in subdivision (a) with a willful and conscious disregard of the rights or safety of others.

Similarly, California Welfare and Institutions Code §203 states:

> An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding.

INTRODUCTION

The Petitioners' "questions presented" are not supported by the facts or procedural posture of this case. Here, as on appeal below, Petitioners misstate the thrust of the case and ignore the evidence favorable to Respondent, Deanna Fogarty-Hardwick. They draw unreasonable inferences to support their position and recite evidence never admitted at trial, without so alerting this Court. *See* Pet. App. 2, fn.2, (p.) 37 (The California Court of Appeal found: "[O]nce again the County has crafted an argument without fully acknowledging what *actually occurred* in the trial court below."). The result is a skewed, incorrect, and inappropriate presentation which fatally undermines the propriety of the "questions" Petitioners purport to present.

Here is what really happened: Consistent with Orange County's standard operating procedures, on February 23, 2000, social services agent Marcie Vreeken made allegations against Fogarty-Hardwick in a juvenile dependency petition when she knew no

evidence supported the allegations. Resp. App. 23-29, 33-40, 45-52, 62-65, 68-69, 71-72, 125-128. Orange County social service agents then fabricated evidence, perjured themselves, and withheld exculpatory evidence from the juvenile court. Resp. App. 120-123, 143-145. Their lies and omissions caused the removal and continued detention of Fogarty-Hardwick's daughters, who were six and nine years old at the time. Resp. App. 79-82. Fogarty-Hardwick was swept into a maelstrom that would consume her and her children's lives for the next six and one half years. By the time Fogarty-Hardwick and her children were released from the clutches of social services, she had been destroyed physically, emotionally, and financially. Pet. App. 25-26, fn.5; Resp. App. 40-44, 102.

Petitioners strain the facts in attempting to analogize this case to *Connick v. Thompson*, No. 09-571 (argued Oct. 6, 2010). Any perceived correlation is belied by the finding that substantial evidence was presented to show that what was done to Fogarty-Hardwick was "*not an isolated incident*." Pet. App. 50. Moreover, in a footnote, Petitioners concede Fogarty-Hardwick "did show a pattern," i.e., that the County has a practice of allowing its agents to state allegations in juvenile dependency petitions when they know there is no evidence to support them. Petition page 24, fn.5. The uncontroverted evidence showed there was no "limitation on the allegations [the Social Services Agency (SSA)] can make against a parent

where there is no evidence to support the allegation." Resp. App. 72.[1]

Petitioners conclude this practice or "pattern of conduct did not harm Deanna, and was not the basis for the imposition of damages." Petition page 24, fn.5. The jury, the trial judge, and the appellate court *all* disagreed with Petitioners on this critical *factual* question.

In another recent unpublished decision the same Court of Appeal explained the problem with Orange County's practice and again admonished it:

> This kind of pleading undermines confidence in the system. It damages the reputation of the Social Services Agency ["SSA"] and causes parents to suspect the system is prejudiced against them, and social workers will use any excuse they can think of – whether credible or not – to deprive them of the custody of their children. *It has to*

---

[1] The limited excerpts of evidence submitted herewith demonstrate that Fogarty-Hardwick proved other patterns and practices as well: The practices of: knowingly stating baseless allegations against parents, including Fogarty-Hardwick, in dependency petitions (Resp. App. 15-16, 18-19, 21-22, 28-29, 62-65, 71-72 ["Question: Are you aware of any written policy which imposes any limitation on the allegations your agency can make against a parent where there is no evidence to support the allegation? Answer: I'm not aware of any."]); not investigating complaints against social workers (Resp. App. 69-70, 74-75, Hermes, 53-60); and protecting each other when faced with accusations of misconduct (77). In fact, the agency banded together against Fogarty-Hardwick (Resp. App. 34-40, 45-52).

> *stop*. . . . With great power comes great responsibility. SSA has great power. The facts of this case and others brought to us in recent months (*see, e.g., Fogarty-Hardwick v. County of Orange* (G039045, June 14, 2010) [nonpub. opn.], and *In re Tyler H.* (G043216, Aug. 26, 2010) [nonpub. opn.]) suggest the agency has somehow temporarily detoured from its long tradition of exercising that power wisely and responsibly. . . .

Resp. App. 190-191.

STATEMENT OF THE CASE

Petitioners' statement of the case is incorrect in material aspects. Abbreviated below are the salient facts the appellate court found. Its statement of facts is binding. *See* California Rules of Court, Rule 8.500(c)(2); *Marriage of Goddard* 33 Cal. 4th 49, 53 (2004), fn.2.

A. Factual Summary.

Fogarty-Hardwick separated from her husband in 1995. They obtained a judgment of dissolution in 1998. Initially, Fogarty-Hardwick had primary custody of the couple's two daughters, K. and P. In November 1999, Fogarty-Hardwick brought K. to a therapist who had been engaged to help the girls "adjust[ ] to their father's recent remarriage." Pet. App. 3-4. They told the therapist that their father had

sexually abused K. *Id.*[2] The therapist was under a mandatory duty to report these allegations to authorities, and she did. *Id.*

The Orange County Social Services Agency (SSA) filed a dependency petition alleging P. and K. were at risk of serious physical harm or illness and sexual abuse. Pet. App. 4. At the initial detention hearing on November 19, 1999, the court ordered that the children remain in Fogarty-Hardwick's custody. *Id.* Their father was allowed monitored visitation. On February 8, 2000, SSA filed an amended petition. *Id.* Another social worker was initially assigned to the case, but Vreeken succeeded her in short order.

On February 13, 2000, Fogarty-Hardwick brought the girls to a monitored visit with their father. The children resisted. Although the monitor tried to coax them, he was unsuccessful, and Fogarty-Hardwick ultimately took them home. Pet. App. 5. Two days later, on February 15, 2000, Fogarty-Hardwick brought the girls to a monitored visit with their father at the SSA office. *Id.* After the visit Vreeken spoke with the girls alone, telling them they were *required* to visit with their father, and "if they didn't visit with their father, the judge was going to put them in a home." This caused both girls to

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[2] The purpose of the visit was *not* "to report sexual abuse" as Petitioners claim. *See* Petition 7. Nowhere in the opinion is it stated that Dr. Mitchell was "suspicious about the timing" of K.'s allegations. Although she did testify *generally* that she "always question[s] the timing of allegations."

become frightened and start to cry. P. ran to get Fogarty-Hardwick, leaving K. alone with Vreeken. *Id.* When Vreeken brought K. to join P. and Fogarty-Hardwick, K.'s face was discolored and her eyes were swollen. *Id.*

Vreeken informed Fogarty-Hardwick that she told the children they would be placed in a home if they didn't visit with their father. This upset Fogarty-Hardwick so much that she vomited. Pet. App. 5. She begged Vreeken for guidance as to what more she could do, because she didn't want to lose her daughters. Vreeken said "you'd better call your attorney." *Id.*

On February 17, 2000, two days after that disastrous meeting, the court held a hearing on the amended petition at which it had an off-the-record discussion with counsel and Vreeken. Vreeken made false allegations against Fogarty-Hardwick, including assertions that Fogarty-Hardwick had caused her daughters to skip a mandatory visit with their father, and had told the children their father was trying to take them away from her. Pet. App. 6. In reality, it was Vreeken, not Fogarty-Hardwick, who made inappropriate comments to the children, including threatening to put them "in a home" if they did not visit with their father. *Id.*

Although Fogarty-Hardwick denied all of Vreeken's assertions, the court nonetheless concluded, based upon the evidence of Fogarty-Hardwick's conduct as falsely reported by the social services agents, that she

was "using these children." The court emphasized "[t]here is no question in my mind, based on what I have got right now before me, that that's what's going on." The children were taken into SSA custody that same day. Pet. App. 6-7.

The social services agents filed a second-amended petition on February 23, 2000, in which they reiterated, as official allegations, the false claims they made to the court at the February 17th hearing. Pet. App. 7. The girls were removed from Fogarty-Hardwick's custody and placed in the Orangewood Children's Home, where they remained for more than a month. *Id.* Fogarty-Hardwick was restricted to supervised visitation. Although the court authorized SSA to return the girls to Fogarty-Hardwick's custody on February 23, 2000, the social services agents refused to do so. Instead, on March 21, 2000, the girls were moved to foster care, where they remained until May 2000. *Id.*

Meanwhile, on March 1, 2000, Vreeken and Fogarty-Hardwick had a highly-charged conversation concerning the false claims Vreeken made about Fogarty-Hardwick's conduct. Vreeken got angry and threatened that if Fogarty-Hardwick did not "submit" to her will, she would "never see [her] kids again." Pet. App. 7-8. And while both girls, and especially K., exhibited significant emotional distress in their placement, which their therapist reported to SSA, the social services agents concealed that information

from the court. Instead, Vreeken falsely claimed in testimony that the children were doing well. *Id.*[3] Both social services agents also demeaned Fogarty-Hardwick to others involved in the case, portraying her as a spoiled beauty queen who was born with all the advantages and was used to getting her way. *Id.*

Ultimately, on May 19, 2000, Fogarty-Hardwick signed a "case plan" which provided the dependency case would be dismissed and the children released from foster care upon conditions. Pet. App. 9. Specifically, the children would be released into their father's temporary custody. Fogarty-Hardwick believed that acquiescing to the plan was necessary to get her children out of foster care and that she had no choice but to agree. *Id.* The dependency case was dismissed, and the custody issue was transferred to family court. *Id.*[4]

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[3] Petitioners claim the information regarding K.'s emotional distress in placement was reported to the juvenile court, but failed to address Vreeken's false testimony to the Court while on the witness stand. *See* Petition page 13 (compare Resp. App. 120-123). Petitioners also fail to disclose that the "report" they filed came several days after the juvenile court had made its decision based on Vreeken's omissions, and the damage had been done.

[4] Petitioners' reference to the family court order and proceedings should be stricken. The order was never admitted into evidence, and their request for judicial notice on appeal was denied. Petitioners requested judicial notice of a different and unrelated document before the California Supreme Court. That request was granted.

Despite Fogarty-Hardwick's complaints and others' expressed concerns about how the dependency case was handled, SSA did not investigate or consider assigning different agents to the matter. Resp. App. 124. No involved agents were disciplined. Instead, Vreeken was promoted to supervisor in 2001. Pet. App. 9-10.

The custody proceedings in family court were protracted. The court did not enter a final order until December 2001. In that order, legal and physical custody of the children was awarded to Fogarty-Hardwick's ex-husband. That order was significantly affected by the events and outcome of the dependency case and was properly construed as evidence of Fogarty-Hardwick's continuing damages, as the Court of Appeal found. Fogarty-Hardwick finally regained shared custody of her daughters in June 2006 – over six years after they were taken from her. Pet. App. 10, 26, fn.5.

B. Procedural History.

1. The Complaint's Allegations:

Fogarty-Hardwick sued Petitioners in February 2001 alleging tort claims based on state and federal law. Pet. App. 10-11. Specifically, she alleged social services agents presented intentionally false statements, fabricated evidence, and committed perjury as part of their successful effort to convince the juvenile court to remove Fogarty-Hardwick's daughters from her custody and place them in foster care. *Id.* In

addition, Fogarty-Hardwick alleged Marcie Vreeken and her supervisor Helen Dwojak deliberately withheld exculpatory information from the court concerning the emotional trauma Fogarty-Hardwick's daughters suffered while in foster care, thereby convincing the court to extend the children's placement. *Id.* Orange County had a policy of deliberate indifference to the rights of parents in Fogarty-Hardwick's situation and, as a result of that policy, the County failed to supervise, control, or direct the conduct of its agents. *Id.*[5]

2. The Demurrer, Initial Appeal, and Remand:

The County demurred to Fogarty-Hardwick's second-amended complaint asserting collateral estoppel under state law and absolute-immunity. Pet. App. 11-12. The trial court sustained the demurrer with prejudice. Fogarty-Hardwick appealed. The appellate court reversed and remanded finding that under *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2002), social services agents have absolute-immunity only for the

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[5] Although Petitioners couch this issue as one of "training," the evidence adduced at trial shows it was, in part, the County's deliberate failure to supervise its agents that caused the deprivation of Fogarty-Hardwick's constitutional rights. Resp. App. 33-40, 44-54, 58-60, 103-107, 146-164.

quasi-prosecutorial decision to institute dependency proceedings. Resp. App. 12-13.[6]

3. Petitioners' Answer and Post-Remand Proceedings:

On remand the County pled qualified immunity, but omitted collateral estoppel and absolute-immunity. Pet. App. 12-13. In April 2006, the County moved for summary judgment, arguing that (1) all the wrongful conduct alleged against Vreeken and Dwojak qualified as "quasi-prosecutorial" and was thus protected by absolute-immunity; and (2) the conduct fell within the absolute testimonial privilege. *Id.* In opposition, Fogarty-Hardwick argued Petitioners waived absolute-immunity by failing to plead it. The trial court denied the motion in October 2006. *Id.*

In December 2006, on the eve of trial, Petitioners sought leave to amend their answer to include "absolute, judicial, prosecutorial and testimonial privilege of federal law." Petitioners asked the court to exercise its discretion to allow the late amendment "in the furtherance of justice." Pet. App. 13. The court denied

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[6] Petitioners did not raise collateral estoppel or arguments based on *Heck v. Humphrey*, 512 U.S. 477 (1994) in the first appeal or in the trial court on remand. Nor did they seek California Supreme Court review of this earlier appellate decision.

the motion, finding Fogarty-Hardwick would be prejudiced by the unreasonably late amendment. *Id.*

4. The Trial, Jury Instructions, and Petitioners' Failure to Proffer Controverting Evidence Regarding Their Pre-trial Admissions:

Trial commenced in February 2007. The court read the agreed-upon instructions to the jury in March 2007.[7] Resp. App 130-137. Petitioners did not offer any clarifying instructions to suggest a more stringent level of causation was required. Nor did they offer instructions requiring Fogarty-Hardwick to prove – as an element of her claims – that she "prevailed" in the underlying dependency or family court proceedings. Both omissions are critical to the questions for which Petitioners seek certiorari.

In discovery Petitioners each admitted, among other things, that they "were at all times carrying out the customs, meaning the permanent, widespread, or well-settled practices of defendant Orange County Social Services Agency in [their] handling of the matter." Fogarty-Hardwick read these admissions to the jury at trial. Resp. App. 86-92. Petitioners did not object. Moreover, Petitioners did not contest the

[7] In an unreported jury instruction conference, the parties mutually agreed upon the instructions to be read to the jury. Petitioners raised no objections to these instructions, which they did not challenge on appeal.

meaning or importance of the admissions in their case-in-chief. Nor did they do so in post-trial motions. Instead, Petitioners ignored their admissions and simply argued Fogarty-Hardwick was not credible. Res. App. 137-138. The jury awarded Fogarty-Hardwick damages, and the court – being "taken aback" by the evidence it heard – issued an injunction. Pet. App. 13-15; Resp. App. 140-142.

5. Post-trial Proceedings:

Petitioners' did *not* complain in their post-trial motions that the pre-trial admissions were improperly used. Nor did they complain that this Court's ruling in *Heck v. Humphrey*, 512 U.S. 477 (1994) barred the action. Instead, they asserted they should have been permitted to amend their answer to add the absolute-immunity defense. The court denied their motions, and they appealed. Pet. App. 15-16.

6. Proceedings on Appeal:

The Court of Appeal reversed the injunction, but affirmed the remainder of the judgment. The court held:

a) The December 2001 family court custody order – entered months after Fogarty-Hardwick filed suit – was *sui generis*. Thus, as a matter of state law, it could have no collateral estoppel or *res judicata*

impact on Fogarty-Hardwick's civil rights claims. Pet. App. 16-17.

b) The termination of the dependency case – by coerced agreement – was "*the product*" of the social services agents' misconduct and could not have a preclusive effect on Fogarty-Hardwick's civil rights case.[8] Pet. App. 18-25 ["We cannot engage in the kind of 'boot-strapping' that would allow the County to rely upon the outcome of the tainted dependency case as a basis to avoid liability for the very acts which tainted it."].

c) The numerous avenues to challenge a criminal conviction listed in *Heck* are not available in dependency cases, which are civil – not criminal – cases. Pet. App. 23, 26-27.

d) Petitioners failed to meet their burden on appeal to "identify and establish deficiencies in the evidence" by failing to "summarize the evidence . . . favorable and unfavorable and show how and why it is insufficient." Pet. App. 28-30.

e) Petitioners made no effort to demonstrate the trial court abused its discretion in

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[8] Vreeken threatened Fogarty-Hardwick, that she would never see her children again if she didn't submit to Vreeken's will. In response, Fogarty-Hardwick agreed to the terms of a "voluntary" case plan in exchange for the dismissal of the dependency case.

denying their motions regarding absolute-immunity and therefore waived the issue on appeal. Pet. App. 30-31 ["Having failed to acknowledge the waiver determination made below, the County has made no effort to demonstrate the trial court abused its discretion in making it."].

f) Petitioners "once again failed" to meet their burden to summarize the evidence on point fairly. The County therefore waived its challenge to the evidence to support the existence of a policy or practice of condoning perjury in reports or testimony. Pet. App. 34-36 ["Under these circumstances, we have no choice but to conclude the County waived its claim of insufficiency of the evidence to support the existence of a policy."].

On appeal Petitioners relied heavily on matter outside the trial record, but their request for judicial notice was denied. Pet. App. 2, fn.2. Without disclosing the appellate court's denial of their request, Petitioners rely heavily on that material here.[9]

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[9] A good example of this tactic can be seen in Petitioners' description of the family court proceedings (Petition 15) where they cite "App. 85 [and] 86." Petitioners' Appendix, pages 72-91, were never introduced at trial or admitted into evidence. Petitioners' request for judicial notice on appeal was denied. Their arguments were properly rejected on appeal. *The Nippon Credit Bank v. 1333 North Cal. Boulevard*, 86 Cal. App. 4th 486, 499-500 (2001).

The Court of Appeal admonished Petitioners:

> The fact that a very well respected member of the superior court bench viewed the issuance of injunctive relief as necessary here highlights the egregiousness of defendants' conduct in this case. . . . The evidence at trial obviously caused both the jury *and the judge* to conclude not only that something seriously wrong was done to Fogarty-Hardwick in this case, but also that the wrongful conduct was *not an isolated incident*. Pet. App. 49-50.

Orange County continues to employ the same customs, practices, and tactics which the jury found to have caused Fogarty-Hardwick's damages. Resp. App. 190-191. This further underscores the appellate court's recognition that what happened to Fogarty-Hardwick was "*not an isolated incident*." Pet. App. 50.

7. California Courts Deny Rehearing and Review:

Petitioners petitioned for rehearing, complaining the court's finding of waiver seemed "unduly harsh." Rehearing was denied June 12, 2010. Petitioners then sought California Supreme Court review. That court unanimously denied review on September 29, 2010. Pet. App. 93.

REASONS FOR DENYING THE PETITION

Several fatal defects pervade the petition and underscore its lack of merit:

- Petitioners fail to affirmatively demonstrate this Court's jurisdiction to review the case;
- Petitioners fail to show that review is necessary or appropriate to secure uniformity in federal case law. The issues presented were decided on state law grounds, i.e., waiver for failing to follow proper appellate procedures, among other things;
- Petitioners essentially challenge the quantum of evidence, contrary to the Court of Appeal's finding that it was substantial and fully supported the judgment. In so doing, they ignore the evidence favorable to Fogarty-Hardwick as well as the strong presumptions supporting the appealed judgment.

A. The Court Lacks Jurisdiction to Hear The Matter.

Under 28 U.S.C. §1257(a) this Court has power to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right . . . is specially set up or claimed under the Constitution or . . . statutes of . . . the United States." On review of a decision of a state's highest court, the Court has no jurisdiction to

consider a contention that was not raised and decided below.

This Court almost unfailingly refuses to consider any federal-law challenge to a state-court decision unless the federal claim was first properly presented to the state court that rendered the decision. *Howell v. Mississippi*, 543 U.S. 440, 443 (2005). When the highest state court has failed to decide a federal question, it will be assumed the omission was due to lack of proper presentation in state courts, unless the aggrieved party can show the contrary. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 (1983); Supreme Court Rule 14(g)(i).

Petitioners fail to accurately describe the basis for the Court of Appeal's decision. The decision largely rests on their failure to designate an adequate record and/or adequately brief the issues on appeal. Moreover, other than as to the question of whether absolute-immunity was waived, Petitioners failed to bring their complaints to the trial court's attention – and thus waived them there – as opposed to on appeal, where their other waivers occurred.

1. Petitioners Failed to Properly Raise Their "Questions" in the Appellate Court.

Petitioners have failed to show their "federal claims" were properly raised or preserved. *See, e.g.*, Pet. App. 28-29 [failure to overcome presumption of correctness, failure to summarize the evidence fairly];

30-32 [failure to designate an adequate record, absolute-immunity defense was waived by failing to claim trial court decision was an abuse of discretion]; 34-36 [challenge to sufficiency of the evidence to support *Monell*[10] liability waived by County's failure to state facts fairly or argue position on appeal]; 39 ["The disproportionate argument concocted by the County is simply untrue and misleading"]; 41-42 [" . . . County gave new meaning to the word 'laconic' . . . "].

Petitioners are burdened with affirmatively demonstrating this Court's jurisdiction by presenting an adequate record to show the state court had a fair opportunity to address the federal question they seek to present. *Adams v. Robertson*, 520 U.S. 83, 87 (1997). To meet this burden, Petitioners must establish either that the claim was raised "at the time and in the manner required by state law," *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988), or persuade the Court that the state procedural requirements could not serve as an independent and adequate state-law ground for the judgment. *See, e.g.*, *Hathorn v. Lovorn*, 457 U.S. 255, 262-265 (1982).

Without reference to the record or meaningful analysis of the trial evidence or opinion below, Petitioners conclude: "This court has jurisdiction under 28 U.S.C. Section 1257." Petition page 1. More is required.

The Court of Appeal expressly found Petitioners waived most of their questions presented by failing to

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[10] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

adhere to California's appellate procedures. Those issues that were not expressly found to have been waived on appeal were waived by Petitioners' failure to raise them by objection – or otherwise – in the trial court.

i. Petitioners Waived Their Absolute-Immunity Issue by Failing to Properly Challenge the Trial Court's Rulings on Appeal.

Petitioners claim the Court of Appeal held: "[T]he County waived the defense of absolute immunity by failing to plead it in its answer." *See* Petition 20, 34-35. Not so.

What the appellate court actually held is that Petitioners waived the absolute-immunity issue by not designating an adequate record and by failing to properly raise the issue on appeal.

> However, what the County does not do is acknowledge that the trial court deemed the absolute immunity defense to have been *waived* in the proceedings below. . . . And having failed to acknowledge the waiver determination made below, the County has made no effort to demonstrate the trial court abused its discretion in making it.
>
> In particular, the County does not even *mention* in its opening brief on appeal that it failed to plead absolute immunity as a defense in its answer, or that it moved to add the defense to its answer only shortly before

> trial. We find it quite remarkable that [the] opening brief does not acknowledge that the court denied that motion as untimely, and that the County did not include that order as part of the record on appeal. . . . The County having failed to even claim, let alone establish, that ruling amounted to error, we must affirm the trial court's determination the defense of absolute immunity was waived. Pet. App. 30-32.

ii. Petitioners Waived All Their *Monell* Issues.

The appellate court also held Petitioners waived the *Monell* issues raised at pages 22-30 of their petition:

> [I]n asserting this claim, the County has once again failed to make any effort to satisfy its burden to summarize the evidence on the point, favorable and unfavorable, and show how and why it is insufficient. . . . Under these circumstances, we have no choice but to conclude that the County waived its claim of insufficiency of the evidence to support the existence of a policy. Pet. App. 35-36.

2. Petitioners Failed to Properly Preserve Their "Questions" in the Trial Court.

Under Supreme Court Rule 14(g)(i), where review of a state-court judgment is sought, as here,

petitioners must affirmatively show their objections were raised both in the trial and appellate courts. Petitioners must show "the method or manner of raising" those objections *and* "the way in which they were passed on by those courts." It is Petitioners' burden to provide the Court "with specific reference to the places in the record where the matter appears so as to show that the federal question was timely and properly raised." Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court, but also aids the Court in its deliberations by promoting the creation of an adequate factual and legal record. *Adams v. Robertson*, 520 U.S. 83, 90-91 (1997).

Petitioners can never meet their burden because they never objected in the trial court on *any* basis raised in their first three questions.[11] Having failed to raise the claim when its legal and factual premises could have been litigated, Petitioners cannot raise it now. *Muhammad v. Close*, 540 U.S. 749, 755 (2004).

i. Petitioners Failed to Preserve Objections Based on *Heck v. Humphrey*.

The decision in *Heck v. Humphrey*, 512 U.S. 477 (1994) analogizes the burden of a plaintiff under 42 U.S.C. §1983 to that of a plaintiff in a malicious

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[11] As for question 4, Petitioners waived any challenge to the trial court's denial of absolute-immunity by failing to properly raise it on appeal, as noted above.

prosecution case. Petition page 33. As the Court of Appeal explained, the thrust of Fogarty-Hardwick's claims cannot be likened to a malicious prosecution action, or one for legal malpractice or wrongful conviction. At trial, Petitioners must have agreed; otherwise, they would have requested the jury instructions for malicious prosecution and/or abuse of process found at CACI 1500, 1501, and/or 1520. Resp. App. 174-178. If Petitioners found fault with the "causation" or "deliberate indifference" instructions, it was incumbent upon them to object or suggest clarifying instructions. They did not do so, and instead agreed to the instructions given. Petitioners also failed to offer instructions requiring Fogarty-Hardwick to prove her "factual innocence." Petitioners then raised no challenge to the instructions on appeal, and thus doubly waived any claim of error in them.

Petitioners never asserted to the trial court that *Heck v. Humphrey* barred the action or that the evidence presented was insufficient to support the verdicts. Their only complaint, as noted above, was that they should have been permitted to raise absolute-immunity as a defense. Based on this record, Petitioners cannot demonstrate question 3 was preserved (*i.e.*, whether *Heck v. Humphrey* applies to California juvenile dependency or family court orders).

ii. Petitioners Failed to Preserve Substantive Objections to Their Pre-trial Admissions.

Petitioners failed to interpose any objections – at all – to the requests for admissions, and failed to object when their admissions were read to the jury. Resp. App. 85-93. In closing argument, Petitioners again ignored their admissions. Resp. App. 137-138. They did the same in their post-trial motions. Petitioners now protest that their admissions didn't mean what they said, but they are in no position to complain. Petition pages 29-30.

There was ample opportunity before, during, and after trial for Petitioners to object to their admissions, or to counter the obvious impact of those admissions by introducing explanatory or controverting evidence, yet they failed to do so.

a. Petitioners' Authorities Do Not Apply.

Waiver aside, on the merits, in *Hudson v. City of N. Las Vegas*, No. 2:04-CV-01518, 2007 U.S. Dist. LEXIS 2377 (D. Nev. Jan. 4, 2007), the trial court found the plaintiffs' constitutional rights had not been violated: "The Court already has concluded Defendant officers did not violate Hudson's Fourth Amendment rights, therefore Hudson's municipality claim fails because he has not demonstrated a constitutional violation." *Id.* at 22. The fact that the municipality "admitted" its officers' conduct comported with

policy was unimportant because those policies were not unlawful.

In *Copper v. City of Fargo*, 905 F.Supp. 703 (D. N.D. 1995), the district court did not find the plaintiff's requests for admissions were improper, contrary to Petitioners' claim. Rather, under the specific facts in *Copper*, and in conjunction with other evidence, the trial court concluded "that municipal liability premised on a ratification theory does not flow from the City's admissions." *Id.*

By contrast, Vreeken and Dwojak admitted their conduct comported with County policy. Resp. App. 87-92. Dwojak knew what those policies were – she was responsible for training other agents about them. Resp. App. 62-64, 68. Dwojak also testified that, pursuant to County policy, agents were permitted to make allegations against parents in juvenile dependency petitions when they knew there was no supporting evidence at all. Resp. App. 71. She also testified that there was no limitation on the extent of unsupportable allegations agents were permitted to make. Resp. App. 72. When Petitioners admitted they followed policy in the treatment of Fogarty-Hardwick, they knew the allegations leveled against them. They also knew what actually happened in February 2000, and after. Resp. App. 18-19, 21-31, 62-77, 107-109, 120-128.

b. Petitioners Ignore Important Distinctions Between Federal and State Law Governing Pre-Trial Admissions.

Under federal law, responses to RFAs need not be verified under penalty of perjury. *See* FRCP Rule 36. The opposite is true under California law. *See* C.C.P. §§2033.210-2033.250. Verifying the responses is, in effect, a declaration that the party has disclosed all information available to her. *Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 782 (1978)

California requires the responding party to undertake a "good faith" and reasonable investigation in formulating answers to RFAs. *See* C.C.P. §2033.220(c); *Chodos v. Superior Court*, 215 Cal. App. 2d 318, 322 (1963). Moreover, an admission may be amended or withdrawn upon noticed motion. C.C.P. §2033.300(a); *Valerio v. Andrew Youngquist Construction*, 103 Cal. App. 4th 1264, 1272 (2002). Leave to do so is liberally granted where the trial court finds the admission was (1) the result of "mistake, inadvertence, or excusable neglect;" and (2) there is no prejudice to the party who propounded the request. C.C.P. §2033.300(b); *New Albertsons, Inc. v. Superior Court*, 168 Cal. App. 4th 1403, 1418 (2008).

The trial court retains discretion to determine the scope and effect of a party's admission. For example, the court – if asked – may determine whether an admission accurately reflects the truth in light of other evidence in the case. This prevents RFAs from

being misused as a device to hide or confuse issues. *Fredericks v. Konots Industries, Inc.*, 189 Cal. App. 3d 272, 278 (1987). Even after the Petitioners' responses were read to the jury, they made no effort whatsoever to request that the trial judge intervene and restrict the application of their admissions. Thus, they waived any claimed defect in the requests or responses.

iii. Petitioners Failed to Preserve Their "Single Incident/Causation" Arguments Raised in Question 1.

In essence, Petitioners complain that the evidence adduced at trial was insufficient to support the verdict. But, Petitioners do not claim verdict form #5 was erroneous, nor could they. Pet. App. 64-65. It was a stipulated form. Similarly, as noted above, Orange County agreed to the jury instructions on deliberate indifference and failure to supervise its agents. *See supra*, note 7.

The trial court read the following to the jury:

> Ms. Fogarty-Hardwick claims that she was deprived of her civil rights as a result of the Orange County social services agency's failure to train and/or supervise its employees. To establish this claim, Plaintiff must prove all of the following:
>
> Number one, that the Orange County social services agency's training program was not adequate to train its employees properly to handle usual and recurring situations

and/or its social workers were not adequately supervised in their handling of usual and recurring situations;

Number two, that the Orange County social services agency was deliberately indifferent to the need to train and/or supervise its employees adequately;

Number three, that the failure to provide proper training and/or supervision was the cause of the deprivation of Ms. Fogarty-Hardwick's right to the care and custody of her children or her right of privacy. . . .

Number four, that Ms. Fogarty-Hardwick was harmed; and,

Number five, that Orange County social services agency's failure to train and/or supervise its employees was a substantial factor in causing the Plaintiff's harm. . . .

Deliberate indifference is the knowing or reckless disregard of the consequence of one's acts or omissions. To establish deliberate indifference, Ms. Fogarty-Hardwick must prove that the Orange County social services agency knew or should have known that its failure to provide reasonable training and/or supervision would likely result in a violation of the right to familial association or the right to privacy of Ms. Fogarty-Hardwick. Resp. App. 130-137.

Petitioners offered no clarifying instructions further defining "deliberate indifference" or the type

of evidence necessary to prove it. Under California procedural rules, the "trial court is not obligated to seek out theories [Petitioners] might have advanced, or to articulate" for them that which they have "left unspoken." *Mesecher v. County of San Diego*, 9 Cal. App. 4th 1677, 1686 (1992). Petitioners are precluded from arguing their stipulated instructions were too general or incomplete, unless they requested a clarifying instruction. *Metcalf v. County of San Joaquin*, 42 Cal. 4th 1121, 1130-1131 (2008). No "clarifying" instruction was requested.

Moreover, at no point in their post-trial motions did Petitioners assert the evidence admitted to prove their deliberate indifference was insufficient. Thus, Petitioners again doubly waived the issue.

B. Petitioners Fail to Show That Review Is Necessary or Appropriate to Secure Uniformity in Federal Case Law or to Decide Any Important Questions of Federal Law.

The unpublished appellate opinion has no national or institutional impact. Petitioners do not contend the Court of Appeal's unpublished opinion creates any conflict or lack of uniformity among the federal district courts, nor could they. *See* Resp. App. 180-181 ["case is non-precedented" and "will not have a legal impact beyond the parties." *Id.*].

As Petitioners' counsel averred, the opinion binds only the parties to this action and presents no

important question of federal – or any other – law. All issues raised here were resolved either on an express finding of waiver on appeal or a determination that substantial evidence supports the verdict. Petitioners have never claimed error in the jury instructions. A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. *See, e.g.,* Supreme Court Rule 10. The Court should deny the Petition because it simply raises impermissible challenges to the sufficiency of the evidence, which were waived below.

C. The Appeal Was Correctly Decided and *Connick v. Thompson* is Factually Distinguishable.

Petitioners urge this Court to vacate the appellate decision under principals yet to be announced in *Connick*. Petition page 22. Their request should be denied. *Connick* revolved around a single case of misconduct; Fogarty-Hardwick's case did not.

1. The Facts of *Connick*.

i. The Plaintiff's Case in *Connick* Was Based on Lack of Training and a *Brady* Violation in a Single Case.

The facts in *Connick* are somewhat convoluted. John Thompson was convicted of an attempted armed robbery, but was actually innocent. Attorneys in the

Orleans Parish District Attorney's Office used the conviction to secure Thompson's conviction in an unrelated murder case. Eighteen years later, Thompson uncovered exculpatory evidence that cleared him of the armed robbery charge. Thompson was found not guilty when he was retried for the murder. He sued.

The jury determined the DA's Office was deliberately indifferent to the need to train, monitor, and supervise its attorneys on *Brady*[12] principles. In *Connick*, there was no evidence that the suppression of blood evidence had occurred in any other case. But several prosecutors in that case withheld the same evidence at different times. The district court, apparently after spirited argument, crafted its jury instructions and ruled that Thompson need prove no pattern. The jury was thus asked whether a *Brady* decision "involved a difficult choice or one that prosecutors had a history of mishandling." This allowed it to find the office deliberately indifferent to training based on a single violation.

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[12] *Brady v. Maryland*, 373 U.S. 83 (1963).

ii. Fogarty-Hardwick's Case Was Based on Inadequate Supervision, an Admitted Policy of Making Baseless Allegations, and an Admitted Lack of Policies Designed To Bring Social Workers Into Compliance with Statutory Requirements.

Petitioners complaint that Fogarty-Hardwick's verdict was based on a "single instance" of misconduct, as opposed to a pattern or practice, ignores the evidence and the findings made by the jury and appellate court, i.e. that what Petitioners did to Fogarty-Hardwick "*was not an isolated incident.*" Pet. App. 50; Resp. App. 190-191. Their protest that Fogarty-Hardwick was not harmed by their filing and pursuit of knowingly baseless allegations is also particularly baseless. Petition page 23. In taking this approach, Petitioners again ignore the evidence. Resp. App. 40-44

Unlike *Connick*, in Fogarty-Hardwick's case there was substantial evidence to suggest the County had notice of the misconduct of its agents, yet was deliberately indifferent to the need to supervise them. Pet. App. 9-10; Resp. App. 62-65, 69-70, 74-75, 77, 146-151, 152-164. Moreover, other substantial evidence showed there was: (1) an agency policy of charging the non-abusing parent with failure to protect the child even when it knew there was no evidence to support the charge; Resp. App. 15-16, 18-19, 22-27, 62-64, 74-75, 79-85; (2) a policy of not

allowing parents to be present when their children were interrogated; Resp. App. 27-28, 91-92; and, that Dwojak did not care about what truly happened on February 15, 2000, i.e., she didn't care if her workers lied and fabricated evidence to submit to the juvenile court. Resp. App. 67-70.

Petitioners fail to address or explain the highly damaging testimony of Dr. London, who was important to Fogarty-Hardwick's proof of the *Monell* claims. Resp. App. 33-40, 45-52. London testified about the nature of what he termed an "agency" case, i.e., a case where the entire agency banded together against Fogarty-Hardwick. He further testified that Petitioners' conduct demonstrated the County's regularly-established policies, customs, and practices with regard to the training and supervision of its social services agents. London also testified about how the lack of adequate supervision and training caused the violation of Fogarty-Hardwick's civil rights. *Id.* This type of evidence was not present at trial in *Connick*.

iii. Government Code §820.21 Put All California Counties on Notice of the Pervasive Nature of the Misconduct it Addresses – No Such Statute Existed in *Connick*.

At trial, Vreeken admitted that in 50% of the cases parents complain about social worker perjury. Resp. App. 124-125. Yet, in twenty years, no social

worker had been disciplined for making false allegations against a parent. Resp. App. 113, 117-118. SSA Director Lawrence Leaman testified he never promulgated any policies requiring his agents to disclose exculpatory evidence, in spite of his admission they had a duty to do so. Resp. App. 109-113. Only after this lawsuit was filed did Orange County promulgate a policy to restrain the conduct of its workers and bring them in line with then existing law. Resp. App. 113-116. This is another important distinction between this case and *Connick*. Petitioners complain that "lay persons daily confront the obligation to tell the truth." Petition page 25. They go on to suggest their conduct cannot possibly form the basis for "failure to train" liability. Petition page 25. The good nature of "lay persons" is irrelevant.

In 1995, the California Legislature – reacting to public outcry – enacted Government Code section 820.21. Resp. App. 170-173. Section 820.21 specifically addresses perjury, fabricating evidence, suppressing exculpatory evidence, and using undue influence to obtain evidence by social services agents. Resp. App. 167 ["The child protection system is designed to protect children from abusive parents, but who protects children from the abuses of the system?"]. If it were true that social service agents were adequately restrained by common sense and moral obligation, there would have been no need for this legislation in 1995 – five years before Petitioners and Fogarty-Hardwick crossed paths. Resp. App. 171 ["Currently there does not exist any effective check upon the

arbitrary power or absolute immunity of social workers. Such a situation is antithetical to the American political philosophy and history of accountable government power."].

Petitioners complain "to the extent the California Court of Appeal's affirmance *sub silentio* relies on a failure to train, it completely negates any distinction between municipal and vicarious liability." Petition 24. Petitioners' focus on "inadequate training" mischaracterizes the evidence admitted at trial. The Court of Appeal did not rely on "training" at all. Pet. App. 11 (" . . . the County failed to supervise, control, or direct the conduct of its social workers."). Fogarty-Hardwick proved it was Orange County's inadequate supervision and deliberate indifference to the need for a policy to curb social worker misconduct that caused her harm. Pet. App. 34, 39, fns.12, 50. Petitioners' attack on Fogarty-Hardwick's proof of "inadequate training" is a red herring, and fails to impugn the underlying judgment or the substantial evidence that supports it.

It is true that the jury instructions included both "inadequate training and/or supervision," – which is disjunctive. However, the focus of the evidence presented at trial and argued to the jury was squarely on Orange County's lack of any policy designed to prevent the proven conduct of its agents, and the utter lack of supervision to prevent their wrongful conduct. Resp. App. 109-118.

2. Orange County's Persistent Failure to Adopt Policies and Procedures to Prevent the Conduct Proscribed by Government Code §820.21 is Evidence of Its Deliberate Indifference to Fogarty-Hardwick's Constitutional Rights.

Petitioners put their own spin on the testimony of Susan Holl, who was most knowledgeable about SSA's policies and practices used against Fogarty-Hardwick. Petitioners ignore the fact that, in February 2000, Orange County had no policy prohibiting its social services agents from lying, fabricating evidence, suppressing exculpatory evidence, or exercising undue influence to obtain evidence. Resp. App. 116-117.[13]

They do the same with regard to Lawrence Leaman's testimony. Despite his knowledge about the "hot button" issue of parents' rights, and the fact that his agency's practices were under scrutiny, he never promulgated policies to require disclosure of exculpatory evidence. Resp. App. 111-113.

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[13] As an interesting anecdote, in an amicus brief filed by The California Association of Counties in support of Orange County on appeal, it was conceded that allegations of social worker perjury are "ubiquitous." Thus, it can hardly be said that counties don't "know" what their workers are doing. The Legislature knew in 1995 – and acted. Its voice simply fell on deaf ears.

Municipalities cannot insulate themselves from liability by delegating their policymaking authority. *See, e.g., St. Louis v. Praprotnik*, 485 U.S. 112, 126 (1988). The authority to make municipal policy is necessarily the authority to make final policy. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-484 (1986). Thus, it makes sense that, where a municipality fails to promulgate policies to protect constitutional rights under a regularly-occurring set of circumstances, and evidence is presented at trial to suggest that the violative conduct occurs in a significant percentage of the cases that regularly come before the agency, the persistent failure to adopt a departmental policy governing the alleged misconduct, or to implement rules and regulations regarding it demonstrates a "deliberate indifference" to constitutional rights. *See, e.g., Chew v. Gates*, 27 F.3d 1432, 1445 (9th Cir. 1994), cert. den., Feb. 21, 1995; *see also Thomas v. Cook County Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. Ill. 2009), cert. den., Nov. 29, 2010.

3. Petitioners Ignore the Importance of Government Code §820.21.

Petitioners complain: "[A]t the time of the social workers' alleged actions, no law required counties to train their social workers to disclose exculpatory evidence." Petition page 24. Not so – California Government Code §820.21 does. While §820.21 does not explicitly require counties to train their workers, it certainly puts them on notice that without appropriate policies, training, and supervision their workers will

be personally liable for damages. By logical extension, those counties that knowingly elect to remain indifferent to the law will also incur liability for failure to promulgate policies to bring their workers into line with it. *Butz v. Economou*, 438 U.S. 478, 506 (1978).

Petitioners pose the question: "What training could or would assist in ensuring that social workers tell the truth?" Petitioners seem ignorant of their own policies. As noted, Susan Holl testified that policies were finally promulgated in July 2001, within months after Fogarty-Hardwick filed suit, to "provide guidelines for assuring the rights of C.F.S. clients as mandated by state and federal civil rights laws." Orange County's Policy #A-0309 is a nearly verbatim restatement of Government Code §820.21. Yet, in Holl's twenty years of experience working for the SSA, she never heard of a social worker being disciplined for making false statements in a court report, fabricating evidence, or suppressing exculpatory evidence. Resp. App. 117-118. Despite complaints coming from many sources, the County never investigated whether or not the misconduct Fogarty-Hardwick complained of occurred. Even after Fogarty-Hardwick filed suit, Vreeken was promoted to supervisor, not disciplined. Pet. App. 10; Resp. App. 58-60, 64-65, 103-107, 146-164.

D. *Heck v. Humphrey* Should Not Bar This Action.

Petitioners misconstrue *Heck v. Humphrey*, and would have this Court extend it beyond its natural boundaries and purpose. *Heck v. Humphrey*'s favorable-termination rule was intended to prevent a person in custody from using §1983 to circumvent the more stringent requirements for habeas corpus. *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1139 (9th Cir. 2005). Petitioners' argument is flawed.

First, it is based on evidence never admitted at trial, i.e., the family court order. Petition page 33; Pet. App. 72-91. As noted above, judicial notice of this order was denied, and it is therefore patently inappropriate to present it here, especially without revealing its status to this Court.

Second, the "detention order" by which SSA obtained court authorization to remove Fogarty-Hardwick's children was not appealable. The dispositional order is the first appealable order in dependency cases. *See, e.g., In re Melvin A.*, 82 Cal. App. 4th 1243, 1250 (2000). There was no dispositional order in this case. As such, there was nothing to appeal.

The third flaw was aptly pointed out in the Court of Appeal's opinion:

> [T]he numerous avenues to challenge a criminal conviction listed in *Heck* are not necessarily available in a dependency case – as far as we are aware, there is no procedure for "expungement" of a dependency dispositional

> order – and even though a writ of habeas corpus might be theoretically available (at least during the time the child actually remains in detention) we have already explained why requiring a parent to resort to such a remedy, merely to preserve a subsequent claim for damages, is inconsistent with the goals of the dependency proceeding.[14]

Pet. App. 27.

The fourth flaw arises by statute. As a matter of California law, an order adjudging a minor a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding. California Welfare and Institutions Code §203; *see also In re James F.*, 42 Cal. 4th 901, 915 (2008) ("The rights and protections afforded parents in a dependency proceeding are not the same as those afforded to the accused in a criminal proceeding.").

Petitioners' reliance on *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1138-1140 (9th Cir. 2005) for the proposition that federal courts are willing to extend *Heck* beyond its traditional boundaries to civil proceedings is misleading. Petition page 32. There, the court likened the civil commitment proceeding of a convicted rapist to the sentence a prisoner might serve after being convicted. The analogy simply

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[14] As a general rule, release of the detained individual would render a request for habeas corpus relief moot. *In re Stinnette*, 94 Cal. App. 3d 800, 803 (1979).

cannot be stretched to cover the temporary detention of a minor in juvenile dependency proceedings.

E. The Court of Appeal Did Not Err in Finding Petitioners Failed to Properly Challenge the Trial Court's Denial of Absolute-Immunity on Appeal.

Petitioners again misstate the Court of Appeal's decision and improperly rely on *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 858 (2009), for the proposition that absolute-immunity extends to "police officers and social workers." Petition page 34. *Van de Kamp* does not apply: "We here consider the scope of a prosecutor's absolute immunity . . . " *Id.* Social workers are not prosecutors. *See, e.g., Hoffman v. Harris*, 511 U.S. 1060 (1994); *see also* Cal. Gov. Code §820.21.

Misstatements aside, federal pleading procedures do not apply in state courts. Here, petitioners failed to allege the defense of absolute-immunity. When they moved for summary judgment on that basis, the trial court properly denied their motion because the defense was not alleged in the answer. *See FPI Development, Inc. v. Nakashima*, 231 Cal. App. 3d 367, 382 (1991); *see also Government Employees Ins. Co. v. Superior Court*, 79 Cal. App. 4th 95, 98 (2000). When they failed to timely seek leave to amend, it was within the discretion of the trial court to deny the motion. *Record v. Reason*, 73 Cal. App. 4th 472, 487 (1999). Regardless, the issue was waived on appeal by Petitioners' failure to designate an adequate record. Pet. App. 30-32.

CONCLUSION

Petitioners have failed to make the threshold jurisdictional showing that is required. They have also failed to show there is any important question of federal law this Court should decide. This case involves a very fact-specific situation where it was proven that SSA agents' wrongful acts were consistent with the County's regularly-established customs, practices, and policies. Nothing in the Court of Appeal's unanimous unpublished opinion warrants review. This decade-long battle should be finally put to rest. The petition should be denied.

Respectfully submitted,

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

DEANNA FOGARTY-HARDWICK, Plaintiff and Appellant, v. COUNTY OF ORANGE et al., Defendants and Respondents.	G030302 (Super. Ct. No. 01 CCO2379) OPINION

Appeal from a judgment of the Superior Court of Orange County, Stephen J. Sundvold, Judge. Reversed.

Shumate & Associates and Mary D. Shumate for Plaintiff and Appellant.

Beam, Brobeck & West, Bryron J. Beam and Glen A. Stebens for Defendants and Respondents.

Deanna Fogarty-Hardwick (Hardwick) appeals from a judgment that dismissed her tort and civil rights action against the County of Orange, the Orange County Social Services Agency (SSA), and several social workers (collectively, the County, unless otherwise indicated), after the trial court sustained a general demurrer without leave to amend. Hardwick argues the complaint states a cause of action. We conclude the demurrer was properly sustained as to the tort claim, but not the civil rights claims, and so we reverse.

* * *

This action arises out of a juvenile dependency case filed by SSA. After the dependency petition was dismissed by stipulation of the parties, Hardwick commenced the present suit. At issue is the sufficiency of her second amended complaint, which sets out causes of action for intentional infliction of emotional distress, federal civil rights violations (under 42 U.S.C. § 1983), and an injunction.

Hardwick alleges social workers used "intentionally fabricated evidence" to obtain a court order to detain her two daughters on February 17, 2000. The nature of this fabrication is not made clear.

SSA filed an amended dependency petition on February 23, 2000. Hardwick alleges SSA maliciously failed to include exculpatory information, and it filed a false report related to the amended petition. The amendment added an allegation that a social worker overheard Hardwick tell her children something –

what is not said – that caused them to fear their father and refuse to visit him. Hardwick alleges SSA failed to include in the amended petition "exculpatory information . . . that . . . Vreeken [a social worker] was actually the individual who told the children they would be taken away from their mother and placed in a foster care home if they continued to refuse to visit with their father." She also alleges SSA submitted a report to the juvenile court, on the day the amended petition was filed, that "contained intentional false statements of [Hardwick's] conduct, knowing the statements were maliciously false. . . ." The statements in question are not identified.

Another allegation of withholding exculpatory evidence concerns a March 31, 2000 letter to SSA from the children's therapist. The therapist said the children were not doing well in foster care. Testifying at a hearing that day (about what is not revealed in our record), Vreeken said nothing about the letter, acting on instructions from a supervisor. The supervisor, present in court with the letter, failed to reveal it to the court or Hardwick. According to the complaint, both social workers acted "with malice and with conscious disregard of the parental rights of [Hardwick]."

Hardwick also makes several conclusory allegations of perjury. At a March 1, 2000 hearing, SSA "misrepresent[ed] to the court that [the] children were doing well," when in fact they were emotionally depressed and physically ill. On March 29, 2000, Vreeken was "committing perjury by again repeating

the false statements regarding [Hardwick's] conduct on February 13, 2000. . . ."[1] On April 4, 2000, Vreeken "committed perjury, denying that she had made any prior statements regarding the fact that she had expressed concerns for the minor children's well being."

The emotional distress claim (the first cause of action) does not contend the defendants intended to cause Hardwick emotional distress, but rather that they acted intentionally and emotional distress resulted. Alternatively, Hardwick alleges the defendants acted with a willful and conscious disregard of her parental rights, and this conduct caused emotional distress.

There are two civil rights claims. One (the second cause of action) alleges social workers removed the children without cause, and continued to detain them without cause, violating Hardwick's right to familial association and right to be free from unreasonable search and seizure, The facts alleged are as set out above, with Hardwick asserting the various misrepresentations between February 17 and April 4, 2000, were made to detain the children and continue their detention.

The other civil rights claim (the third cause of action) alleges SSA and the County established

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[1] The reference to February 13, 2000, is unclear, since the complaint does not say what is supposed to have happened on that day.

policies that violated Hardwick's constitutional rights under the fourth and fourteenth amendments. These policies pertained to detaining children without a finding of imminent danger of serious physical injury; interviewing children without a parent present; continuing detention after learning there is no basis to do so; using trickery and fabricated evidence; and failing to adequately train employees regarding the constitutional rights of parents. This claim again rests on the events of February 17 to April 4, 2000, which are said to show improper removal of the children and wrongful continuation of detention. An injunction is requested (the fourth cause of action) to restrain defendants from continuing to pursue these unlawful policies.

The trial court sustained the demurrer without leave to amend on the grounds that SSA's actions were protected by governmental immunity under state law or, alternatively, the action was barred by collateral estoppel.[2] On the immunity issue, the judge ruled Hardwick failed to state a cause of action under Government Code section 820.21,[3] which provides that juvenile court social workers have no immunity

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[2] The trial judge's reference to collateral estoppel indicates he gave some credence to the County's argument chat Hardwick sought to relitigate court orders issued in the dependency matter. On this appeal, the County does not argue collateral estoppel supports the ruling sustaining the demurrer.

[3] All further statutory references are to the Government Code.

if acting with malice, they commit perjury, fabricate evidence, or withhold exculpatory evidence. He found the allegations of malice insufficient to come within this statutory exception to governmental immunity. The federal civil rights claims were not addressed. We view the tort claim somewhat differently than the trial court, yet we come to the same result. But that has no bearing on the civil rights claims, as to which the demurrer should have been overruled.

I

The problem with the emotional distress claim is not malice, which is adequately alleged, but the failure to set out a prima facie case of intentional infliction of emotional distress. So the demurrer to this cause of action must be sustained.[4]

The elements of intentional infliction of emotional distress are: (1) extreme or outrageous conduct engaged in with the intent of causing, or reckless disregard of the probability of causing, emotional distress; (2) severe emotional distress; and (3) causation. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.)

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[4] The failure to allege a prima facie case was first raised by the County in its appellate brief, which is permissible. A litigant may raise a new theory on appeal if it presents a pure question of law on undisputed facts (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 259), as is the case here.

Here, Hardwick fails to allege the necessary intent. She claims defendants' acts were intentional, and undertaken with willful disregard of her parental rights, but neither suffices. More than intentional conduct is required – the essence of the tort is an *intent to cause emotional distress*. Likewise, it is not enough to assert a willful disregard of Hardwick's parental rights – it is a disregard of the *risk of causing emotional distress* that makes out the claim. Since actionable intent is missing, the cause of action fails.

Hardwick argues the complaint is sufficient because it alleges the defendants acted knowingly, with malice, and caused her to suffer emotional distress. Unfortunately, this fails to grasp the problem. As we have said, it is not enough to allege intentional conduct and resulting emotional distress. What is required is an *intent to cause* emotional distress or reckless disregard for that likelihood. Hardwick makes no such allegation, so we have no alternative but to affirm the ruling sustaining the demurrer to this cause of action.[5]

II

We briefly address Hardwick's argument that the allegations of malicious conduct are sufficient to

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[5] In her brief, Hardwick argues she should be given leave to amend if the allegations of malice are insufficient, claiming that defect can be cured. But no such claim is made regarding the intent element – which is the problem here.

permit suit against the social workers under section 820.21. She is right as far as governmental immunity is concerned, but that cannot save the tort claim.

The statute in question provides as follows: "Notwithstanding any other provision of the law, the civil immunity of juvenile court social workers, child protection workers, and other public employees authorized to initiate or conduct investigations or proceedings pursuant to . . . the Welfare and Institutions Code [sections 200 to 987] shall not extend to any of the following, if committed with malice: [¶] (1) Perjury. [¶] (2) Fabrication of evidence. [¶] (3) Failure to disclose known exculpatory evidence. [¶] (4) Obtaining testimony by duress. . . ." (§ 820.21, subd. (a).) As used in this section, malice is defined as "conduct that is intended . . . to cause injury to the plaintiff or despicable conduct that is carried on . . . with a willful and conscious disregard of the rights or safety of others." (§ 820.21, subd. (b).)

The tort claim adequately alleges malice for purposes of permitting suit against the social workers. Hardwick alleges social workers twice failed to disclose exculpatory evidence (the social workers' comment to the children and the therapist's letter), and they did so with a willful and conscious disregard of Hardwick's parental rights. The latter tracks the second prong of the definition of malice set out in section 820.21, subdivision (b), so it is sufficient to come with the statute. But getting around governmental immunity does not mean there is a tort cause of action. The fundamental problem remains – the

complaint fails to state facts sufficient to constitute a cause of action for intentional infliction of emotional distress.

We cannot end our discussion of this issue without addressing the County's argument that section 820.21 should not apply because it contradicts the general governmental immunity statutes that would otherwise protect the social workers. The argument consists of nothing more than the naked assertion section 820.21 should not apply, unsupported by either authority or explanation. That hardly makes the case, particularly in the face of the provision in section 820.21 that it applies "notwithstanding any other provision of the law."

III

We invited the parties to submit supplemental briefs on the issue of whether the civil rights claims state a cause of action, and both did so. The County argues the claims under 42 U.S.C. section 1983 are barred by the statute of limitations, they are not pled with sufficient specificity, and there is no threat of future harm that would warrant an injunction. We are not persuaded, so we reverse the judgment as to these causes of action.

Claims under 42 U.S.C. section 1983 are subject to the personal injury limitations period of the forum state, there being no applicable federal statute of limitations. (*Wilson v. Garcia* (1985) 471 U.S. 261, 276.) At the time this action was filed in 2000,

California's personal injury statute of limitations was one year. (Code Civ. Proc., § 340, subd. (3), deleted by Stats. 2002, ch. 448, § 3.)[6]

This action was brought within the statute of limitations. It was commenced on February 15, 2001, just in time, since the facts allege misconduct beginning with the detention on February 17, 2000. The pleading before us is the second amended complaint, filed in September 2001. It seeks recovery on the same general facts as the original complaint (the events of February 17, 2000 to April 4, 2000), so it relates back to the filing of the original complaint for purposes of the statute of limitations. (*Austin v. Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596, 600.)

The County's argument is the civil rights claims initially appeared in a June 2001 first amended complaint. But this is not quite accurate. The original complaint contains a section 1983 cause of action for wrongful removal of the children, and another for failure to adequately train county employees regarding the constitutional rights of parents. Be that as it may, it is not the causes of action pleaded, but the facts upon which they are based, that matters for purposes of relation back. The County does not deny the facts behind the present civil rights claims are

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[6] The personal injury statute of limitations is now two years. (Code Civ. Proc., § 335.1. added by Stats. 2002, ch. 448, § 2.)

the same as those set out in the original complaint, nor does it contest the timeliness of that pleading. So there is no statute of limitations problem.

Nor is there anything to the three specificity arguments offered by the County. First, the County claims state pleading requirements govern, section 1983 claims filed in state court, so the "basis . . . and determination" of the alleged offending policy must be specifically pled. The argument relies on *Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, but the case is irrelevant since it does not involve any federal claims, and we are presented no other authority for this position.

Second, the County argues the second amended complaint is defective because it fails to "prove that the execution of a policy, custom or practice by the County of Orange resulted in the deprivation of a constitutional right." This seems to reflect a misunderstanding of procedure, since proof is not required at the pleading stage. The only question before us is whether the complaint is sufficient to withstand a demurrer. The complaint does allege deprivation of constitutional rights by virtue of a County policy, and that is sufficient for pleading purposes.

The third specificity argument is that the County cannot be held vicariously liable for the acts of its employees. But that is not correct. While a local government is not liable as a matter of respondeat superior for injuries caused solely by its employees or agents, it is responsible for harm caused by

employees carrying out a local government policy or custom. (*Monell v. Dept. of Soc. Serv. of City of N.Y.* (1978) 436 U.S. 658, 694.) Just such a policy is alleged here, so there is a theoretical possibility of liability. The complaint is not deficient for lack of specificity.

The county also argued, in its original brief, that the federal claims are barred because social workers enjoy absolute immunity under federal law. However, it did not raise that point in its supplemental brief, undoubtedly because of the recent en banc decision in *Miller v. Gammie* (9th Cir.) 335 F.3d 889. *Miller* reversed an earlier panel decision relied on by the County, and holds that social workers have absolute immunity only for the quasi-prosecutorial decision to institute dependency proceedings. Beyond that, the burden is on a social worker defendant to show that other functions he or she performed are similar to conduct accorded absolute prosecutorial immunity at common law. (*Id.* at p. 898.)

In this case, the social worker defendants include not only those alleged to have instituted the dependency action, but also others alleged to have participated in subsequent events. Since the latter do not appear to be entitled to absolute immunity, the demurrer to the federal claims cannot be sustained on this ground. We leave it to the trial court to sort out which of the individual defendants may be protected by absolute (or qualified) immunity, should that issue be raised by the County upon a proper motion.

As for the injunction, the County argues there is no threat of future harm, so no basis upon which an injunction might issue. At this stage of the case, however, we cannot parse the remedies sought in order to determine the propriety of an injunction. That is a matter for the trial court if and when one is sought.

Since the civil rights claims are sufficient to state a cause of action, the demurrer to the complaint should have been overruled as to these claims – the second, third, and fourth causes of actions. The judgment is reversed as to these. Appellant is entitled to costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
VS.	)	
COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, AND HELEN DWOJAK,	)	NO. 01CCO2379
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

FEBRUARY 15, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:
LAW OFFICES OF SONDRA S. SUTHERLAND
BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:
BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[130] DEANNA RAE FOGARTY-HARDWICK,

CALLED AS A WITNESS BY AND ON BEHALF OF THE PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

* * *

[198] Q NOW, DID MS. DAVIS – DID MS. DAVIS EVER EXPLAIN TO YOU THAT YOU WERE ALSO POTENTIALLY A TARGET FOR FAILURE TO PROTECT YOUR CHILDREN?

* * *

THE WITNESS: I BELIEVE WE HAD A CONVERSATION – EXCUSE ME. I BELIEVE I HAD ASKED HER FOR CLARIFICATION OF WHY I WAS – I HAD BEEN CHARGED WITH FAILURE TO PROTECT. AND AS I RECALL, SHE SAID IT WAS PROTOCOL IN THESE SITUATIONS;

* * *

BY MR. MCMILLAN:

Q JUST SO THAT I'M CLEAR, WHAT SHE EXPLAINED TO YOU IS THAT IT WAS REALLY JUST A FORMALITY?

A THAT IS HOW SHE EXPLAINED IT TO ME.

[199] Q SOMETHING THAT WAS DONE AS A MATTER OF COURSE?

A THAT'S CORRECT.

Q DID SHE TELL YOU AT THAT POINT THAT WHEN THEY FILED THE PETITION THEY HAD SOME EVIDENCE TO SUGGEST THAT YOU HAD FAILED TO PROTECT YOUR DAUGHTER KENDALL?

* * *

THE WITNESS: NO, SHE DIDN'T.

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
VS.	)	
COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, AND HELEN DWOJAK,	)	NO. 01CCO2379
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

FEBRUARY 22, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:
LAW OFFICES OF SONDRA S. SUTHERLAND
BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:
BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[590] RACHEL DAVIS,

CALLED AS A WITNESS BY AND ON BEHALF OF THE PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

* * *

[628] Q DID YOU OBSERVE DEANNA TO BE AN AFFECTIONATE PARENT?

A AS FAR AS I COULD SEE, YES.

Q DID YOU ALSO INTERVIEW DEANNA IN THIS CASE ABOUT DISPOSITION OF THE CASE?

A YES, I DID.

Q WAS THE MEETING ALSO FOR THE PURPOSE OF REVIEWING THE PETITION AND FINDING OUT WHAT SHE BELIEVED WAS TRUE AND WAS NOT TRUE?

A YES.

Q AS YOU SIT HERE TODAY, CAN YOU TELL ME ANY INFORMATION THAT YOU HAD THAT DEANNA EVER FAILED TO SUPERVISE EITHER KENDALL OR PRESLIE?

* * *

THE WITNESS: NO.

BY MS. SUTHERLAND:

Q DO YOU HAVE ANY REASON TO BELIEVE SHE KNEW THE FATHER WAS ABUSING THE CHILDREN AND IGNORED THE. INFORMATION OR THAT SHE IN ANY OTHER WAY FAILED TO PROTECT THE GIRLS?

A NO.

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
VS.	)	
COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, AND HELEN DWOJAK,	)	NO. 01CCO2379
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

FEBRUARY 23, 2007

APPEARANCES OF COUNSEL:

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BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[801] (THE DEPOSITION TESTIMONY OF ELAINE WILKINS WAS READ INTO THE RECORD AS FOLLOWS:)

* * *

[818] "ARE YOU AWARE OF ANY EVIDENCE THAT EXISTED AS OF NOVEMBER 16, 1999, TO SUPPORT THE ALLEGATION THAT DEANNA KNEW HER CHILD KENDALL WAS AT RISK OF HARM AND FAILED TO PROTECT HER?

"ANSWER: NO, I DO NOT."

* * *

[839] "QUESTION: ARE YOU AWARE OF ANY EVIDENCE THAT DEANNA WAS NOT A FIT AND PROPER PARENT FOR HER DAUGHTERS WHEN THEY WERE REMOVED FROM HER CARE ON [840] FEBRUARY 17, 2000?

"ANSWER: NO.

"QUESTION: DID YOU HAVE ANY REASON TO BELIEVE KENDALL AND/OR PRESLIE WERE IN IMMINENT DANGER OF SERIOUS PHYSICAL INJURY IN THEIR MOTHER'S CARE AS OF FEBRUARY 17, 2000?

"ANSWER: NO."

* * *

[841] "QUESTION: OKAY. AS FAR AS YOU ARE AWARE, WAS THE MANNER IN WHICH YOU

CONDUCTED YOURSELF IN THIS CASE CONSISTENT WITH THE POLICIES AND PRACTICES OF ORANGE COUNTY SOCIAL SERVICES AGENCY?

"ANSWER: YES."

THE COURT: THANK YOU VERY MUCH, MR. MCMILLAN.

* * *

[883] (THE DEPOSITION TESTIMONY OF MARCIE VREEKEN WAS READ INTO THE RECORD AS FOLLOWS:)

* * *

[896] "QUESTION: AND IN THIS CASE YOU'RE NOT AWARE OF ANY EVIDENCE THAT DEANNA EVER SEXUALLY OR OTHERWISE ABUSED HER CHILDREN, ARE YOU?

"ANSWER: NO.

"QUESTION: ARE YOU AWARE OF ANY EVIDENCE THAT DEANNA KNEW HER CHILD KENDALL WAS AT RISK OF HARM AND FAILED TO PROTECT HER?

[897] "ANSWER: NO.

* * *

[901] "QUESTION: NOW, YOU'RE NOT AWARE OF ANY EVIDENCE THAT DEANNA FAILED TO PROTECT HER DAUGHTER KENDALL; RIGHT?

"ANSWER: RIGHT.

* * *

[931] "QUESTION: BEFORE REMOVING KENDALL AND PRESLIE FROM THEIR HOME, DID YOU CONSIDER PLACING THEM WITH ANY OTHER FAMILY MEMBER, FOR EXAMPLE?

"ANSWER: NO.

"QUESTION: DID ANYONE WITH ORANGE COUNTY SOCIAL SERVICES AGENCY MAKE THAT RECOMMENDATION TO THE COURT ON FEBRUARY 17TH?

"ANSWER: NO.

"QUESTION: ARE YOU AWARE OF ANY OTHER EVIDENCE PRESENTED TO THE COURT IN MAKING ITS DECISION TO REMOVE THE CHILDREN FROM DEANNA'S CARE BESIDES YOUR COURT REPORT ADDENDUM AND THE DISCUSSION THAT WAS HAD AT THE COURTHOUSE ON THE [932] 17TH?

"ANSWER: NO.

"QUESTION: ON THE 17TH OF FEBRUARY DID YOU TELL THE COURT THAT IT WAS YOU WHO TOLD KENDALL THAT IF SHE DIDN'T START VISITING WITH HER DAD THE JUDGE WAS GOING TO PUT HER IN A HOME?

"ANSWER: NO.

"QUESTION: DID ANYONE WITH SOCIAL SERVICES AGENCY TELL THE JUDGE ON FEBRUARY 17TH THAT YOU HAD THREATENED TO THE GIRLS THAT IF THEY DIDN'T START VISITING WITH THEIR DAD, THE JUDGE WAS GOING TO PUT THEM IN A HOME?

"ANSWER: NO.

"QUESTION: ANY TIME AFTER DEANNA LEFT ON FEBRUARY 15TH, AND BEFORE THE HEARING ON FEBRUARY 17TH, DID YOU OR ANYONE ELSE AT YOUR AGENCY NOTIFY DEANNA THAT YOU INTENDED TO MAKE THIS NEW ALLEGATION THE MORNING OF THE 17TH? AND I WANT TO CLARIFY THE NEW ALLEGATION BEING THAT SHE ALLEGEDLY TOLD HER CHILDREN – LET ME GET IT RIGHT – THAT THEIR FATHER WAS TRYING TO TAKE THEM AWAY AND PUT THEM IN A FOSTER HOME.

[933] "ANSWER: NO.

* * *

[934] "QUESTION: ARE YOU AWARE OF ANY EVIDENCE THAT DEANNA WAS NOT A FIT AND PROPER PARENT FOR HER DAUGHTERS WHEN THEY WERE REMOVED FROM HER CARE ON FEBRUARY 17TH, 2000?

"ANSWER: NO.

"QUESTION: THE GIRLS WERE NOT IN IMMINENT DANGER OF SERIOUS PHYSICAL INJURY IN DEANNA'S CARE, WERE THEY?

"ANSWER: NO.

"QUESTION: ALL RIGHT. BUT YOU [935] WERE, AS OF FEBRUARY 17TH, 2000, THE SENIOR SOCIAL WORKER WHO WAS RESPONSIBLE FOR THIS PARTICULAR CASE ON BEHALF OF THE ORANGE COUNTY SOCIAL SERVICES AGENCY; RIGHT?

"ANSWER: YES.

"QUESTION: AND AS YOU SAT THERE IN COURT ON FEBRUARY 17TH, 2000, AND THE COURT WAS ORDERING THE REMOVAL OF THESE CHILDREN DUE TO THE MAKING OF FALSE STATEMENTS AGAINST THE FATHER – THE SOCIAL WORKER AND THE MONITOR – WERE YOU AWARE OF ANY FALSE STATEMENTS THAT DEANNA HAD MADE AGAINST ANY OF THESE PEOPLE?

"ANSWER: NO.

"QUESTION: DID YOU SPEAK UP AND SAY, 'WAIT A MINUTE, JUDGE, THERE'S NO EVIDENCE OF FALSE STATEMENTS AGAINST ANY OF THOSE PEOPLE'?

"ANSWER: NO.

"QUESTION: DID YOU EVER HEAR DEANNA DISCUSS THIS CASE WITH THE CHILDREN?

"ANSWER: NO.

"QUESTION: ARE YOU AWARE OF ANY [[936] OTHER SOCIAL WORKER WHO ALLEGEDLY HEARD DEANNA DISCUSS THE CASE WITH THE CHILDREN BEFORE FEBRUARY 17TH, 2000?

"ANSWER: NO.

* * *

"QUESTION: ON WHAT OCCASION OR OCCASIONS AFTER FEBRUARY 15TH AND BEFORE THIS FEBRUARY 23RD SECOND AMENDED PETITION WAS FILED DID THE CHILDREN BECOME FEARFUL AND REFUSE TO VISIT OR TELEPHONE THEIR FATHER?

"ANSWER: AT WHAT POINT BETWEEN THE 23RD AND – COULD YOU RESTATE THAT?

[937] "QUESTION: WELL, THE ALLEGATION IS THAT DEANNA MADE THIS STATEMENT TO THE CHILDREN WHICH CAUSED THE MINORS TO BE FEARFUL AND REFUSE TO VISIT OR TELEPHONE THEIR FATHER; CORRECT?

"ANSWER: YES.

"QUESTION: THAT'S THE ALLEGATION?

"ANSWER: YES.

"QUESTION: SO I'M ASKING YOU, ON WHAT OCCASION OR OCCASIONS AFTER SHE ALLEGEDLY MADE THE STATEMENT ON FEBRUARY 15TH AND BEFORE THIS PETITION WAS FILED ON FEBRUARY 23RD DID THE CHILDREN BECOME FEARFUL AND REFUSE TO VISIT OR TELEPHONE THEIR FATHER?

"ANSWER: I DON'T KNOW.

* * *

[938] "QUESTION: DO YOU HAVE ANY REASON TO BELIEVE THAT DEANNA'S ALLEGED STATEMENT EVER CAUSED THE CHILDREN TO REFUSE TO VISIT THEIR FATHER?

"ANSWER: I HAVE NO – I HAVE NO FACTS TO BACK UP A BELIEF.

* * *

[940] "QUESTION: DID YOU INTERVIEW KENDALL AT ORANGEWOOD ON MARCH 3RD, 2000?

"ANSWER: YES.

"QUESTION: AND MS. DUMAS WAS ALSO PRESENT THAT DAY?

"ANSWER: YES.

"QUESTION: WAS DEANNA EITHER [941] ASKED OR PERMITTED TO BE PRESENT AT THAT INTERVIEW?

"ANSWER: NO, SHE WAS NOT ASKED; AND NO, SHE WAS NOT PERMITTED TO BE THERE.

"QUESTION: AND WHY IS THAT?

"ANSWER: IT'S STANDARD POLICY NOT TO INTERVIEW CHILDREN WITH THEIR PARENTS PRESENT.

"QUESTION: YOU MEAN STANDARD POLICY AT THE ORANGE COUNTY SOCIAL SERVICES AGENCY?

"ANSWER: YES.

* * *

"QUESTION: ARE YOU AWARE OF ANY INTERVIEW WHERE THE MOTHER WAS ALLOWED TO BE PRESENT?

"ANSWER: NO.

* * *

[942] "QUESTION: JUST FOR FOUNDATIONAL PURPOSES, THE SECOND AMENDED PETITION CONTAINS AN ALLEGATION AT PARAGRAPH B-5. THIS IS EXHIBIT 11, BY THE WAY. SEE THE ALLEGATION AT B-5?

"ANSWER: YES.

"QUESTION: THE ALLEGATION THERE IS THAT, QUOTE, ON OR ABOUT FEBRUARY 15TH, THE MOTHER TOLD THE CHILDREN THAT THE FATHER WAS TRYING TO TAKE THEM AWAY

FROM HER AND PUT THE CHILDREN IN A FOSTER HOME, END QUOTE.

"THAT'S THE ALLEGATION THERE – AT LEAST OF THE BEGINNING OF IT, RIGHT?

"ANSWER: YES.

"QUESTION: DID YOU READ THAT ALLEGATION TO KENDALL WHEN YOU MET WITH HER ON MARCH 3RD, 2000?

"ANSWER: YES.

"QUESTION: WHEN YOU READ THIS ALLEGATION TO KENDALL, SHE DENIED THAT DEANNA TOLD HER THAT HER FATHER WAS TRYING TO TAKE HER AWAY AND PUT HER IN A [943] FOSTER HOME, DIDN'T SHE?

"ANSWER: YES.

"QUESTION: IN FACT, SHE STATED EMPHATICALLY THAT, QUOTE, MY MOM DIDN'T SAY THAT, IT'S NOT TRUE, END QUOTE, DIDN'T SHE?

"ANSWER: YES.

"QUESTION: WITH THIS ADDITIONAL INFORMATION, DID ORANGE COUNTY SOCIAL SERVICES AGENCY RETURN CUSTODY OF THE CHILDREN TO THEIR MOTHER?

"ANSWER: NO.

"QUESTION: IN FACT, YOU RECOMMENDED THAT THE CHILDREN BE DECLARED DEPENDENTS OF THE ORANGE COUNTY JUVENILE COURT WITH CUSTODY VESTED IN THE SOCIAL SERVICES' DIRECTOR FOR SUITABLE PLACEMENT?

"ANSWER: YES.

* * *

[944] "QUESTION: AND IF THE JUDGE WERE TO ADOPT THAT RECOMMENDATION, THAT THE CHILDREN BE DECLARED DEPENDENTS OF THE JUVENILE COURT, WITH CUSTODY VESTED IN THE SOCIAL SERVICES DIRECTOR FOR SUITABLE PLACEMENT, THEN THE PLACEMENT DIVISION OF YOUR AGENCY WOULD DECIDE WHAT WAS SUITABLE PLACEMENT?

"ANSWER: YES.

"QUESTION: YOUR AGENCY COULD HAVE RETURNED THE CHILDREN TO THEIR HOME WITH THEIR MOTHER ANY TIME YOUR AGENCY DECIDED TO DO SO AFTER FEBRUARY 23RD, 2000; CORRECT?

"ANSWER: YES.

"QUESTION: AND YOU DID NOT DO SO?

"ANSWER: CORRECT.

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
VS.	)	
COUNTY OF ORANGE,	)	NO. 01CCO2379
MARCIE VREEKEN,	)	
ELAINE WILKINS, AND	)	
HELEN DWOJAK,	)	
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

FEBRUARY 27, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:
LAW OFFICES OF SONDRA S. SUTHERLAND
BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:
BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

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[1064] RAY WILLIAM LONDON,

CALLED AS A WITNESS BY AND ON BEHALF OF THE PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. SUTHERLAND:

Q GOOD MORNING, DR. LONDON.

YOU ARE AN EXPERT WHO WAS RETAINED BY THE PLAINTIFF IN THIS CASE, ARE YOU NOT?

A YES, I AM.

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[1069] Q DID YOU EVEN CONTINUE ON WITH YOUR EDUCATION AFTER OBTAINING YOUR PH.D.?

A YES. I VIOLATED JUNE'S RULE ABOUT NEVER SAYING NEVER. AFTER I FINISHED MY PH.D., I SAID I WOULD NEVER GO BACK TO SCHOOL. SEVERAL YEARS LATER, I WENT BACK FOR A MASTER'S IN BUSINESS ADMINISTRATION.

Q WHAT YEAR DID YOU ACTUALLY OBTAIN YOUR M.B.A.?

A 1989.

Q WAS THAT AGAIN FROM U.S.C.?

A YES.

Q DID YOUR AREAS OF FOCUS IN THAT PARTICULAR PROGRAM INCLUDE ANY SUBJECTS THAT WOULD BEAR ON THE ISSUES IN THIS CASE?

A YES. THE FOCUS OF MY STUDY WAS ON ORGANIZATIONAL STRUCTURES AND POLICIES AND IMPLEMENTATIONS. THAT'S CALLED ORGANIZATIONAL DEVELOPMENT. AND ALSO ORGANIZATIONAL BEHAVIOR, HOW PEOPLE BEHAVE WITHIN ORGANIZATIONS AND HOW ORGANIZATIONS IMPACT THE BEHAVIOR OF EMPLOYEES.

I ALSO WAS A FELLOW AT THE CRISIS MANAGEMENT CENTER. THAT'S DEALING WITH AND ASSESSING HOW [1070] ORGANIZATIONS GET INTO TROUBLE AND HOW THEY RESPOND TO THINGS WHEN THEY DON'T GO RIGHT.

Q DID YOU ALSO FOCUS ON RISK AND CRISIS MANAGEMENT AS PART OF YOUR M.B.A. PROGRAM?

A YES, I DID.

* * *

Q I NEED YOU TO EXPLAIN THEN. THESE WORDS ARE NOT PROBABLY FAMILIAR TO MOST PEOPLE.

WHAT IS ORGANIZATIONAL BEHAVIOR AND DEVELOPMENT ABOUT?

A IT'S ABOUT HOW ORGANIZATIONS FUNCTION AND DEVELOP AND HOW THEY PROVIDE SERVICES OR PRODUCTS AND HOW PEOPLE IN ORGANIZATIONS WORK AND FUNCTION.

Q WHAT IS RISK AND CRISIS MANAGEMENT?

A CRISIS MANAGEMENT AND RISK MANAGEMENT ARE A FIELD OF STUDY THAT LOOK AT HOW THINGS AND ORGANIZATIONS CAN BASICALLY GO WRONG.

LIKE EXXON-VALDEZ OR THE TYLENOL TAMPERING CASES, HOW THERE IS A PATTERN OF BEHAVIOR OF APPROVAL OF [1071] CERTAIN BEHAVIORS THAT – WITHIN ORGANIZATIONS THAT PEOPLE KNOW MAY BE WRONG, BUT THEY DO IT – SOMETIMES THEY THINK THAT THEY'RE SPECIAL AND SO THEY WON'T GET CAUGHT, OR IF THEY GET CAUGHT THEY WON'T CARE.

AND IT'S BASICALLY A FUNCTION OF ASSESSING HOW IT DOES AND WHAT – HOW THEY HANDLE THE SITUATION WHEN IT COMES TO LIGHT AND DOING POST-MORTEMS AFTER.

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[1083] Q ALL RIGHT. NOW I WOULD LIKE TO TURN TO WHAT YOU ARE BASING THE OPINIONS YOU ARE GOING TO GIVE ON.

OKAY?

A UH-HUH.

Q FIRST I WANT TO ASK YOU, HOW MUCH MATERIAL DID YOU READ IN THIS CASE? CAN YOU GIVE US AN IDEA OF THE VOLUME?

A IT STANDS ABOUT EIGHT FEET.

Q DID YOU MAKE A LIST OF THE MATERIALS THAT YOU [1084] REVIEWED IN FORMULATING YOUR OPINIONS?

A YES, I DID.

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BY MS. SUTHERLAND:

Q I'M NOT GOING TO GO THROUGH EVERYTHING ON THE LIST, BUT I WANT TO ASK YOU A FEW CATEGORIES OF ITEMS.

DID YOU REVIEW IN THIS CASE THE ENTIRE SOCIAL SERVICES AGENCY FILE?

[1085] A YES.

Q ABOUT HOW THICK WAS THAT FILE?

A I DON'T KNOW. SIX, SEVEN INCHES, EIGHT INCHES.

Q DID YOU ALSO REVIEW THE JUVENILE COURT FILE?

A YES.

Q DID YOU REVIEW PLAINTIFF'S TREATMENT RECORDS FROM DOCTORS WARNER AND WALDROP AND FROM MS. JANICE BEACON?

A YES.

Q DID YOU REVIEW KENDALL'S SCHOOL RECORDS DATING BACK TO WHEN SHE STARTED?

A YES.

Q ABOUT HOW VOLUMINOUS WERE THOSE RECORDS?

A I DON'T KNOW. SEVEN OR EIGHT INCHES, AS I REMEMBER. THERE WERE A LOT.

Q DID YOU ALSO REVIEW DR. MITCHELL'S RECORDS REGARDING HER COUNSELING OF THE GIRLS OVER THE YEARS?

A YES.

Q ABOUT HOW THICK WERE THOSE RECORDS?

A ABOUT SIX, SEVEN INCHES.

Q AND I'M GOING TO GO THROUGH A LIST OF SOME NAMES, AND I'M GOING TO ASK YOU WHETHER OR NOT YOU READ THESE PERSONS'

DEPOSITION TRANSCRIPTS IN FORMULATING YOUR OPINIONS.

MRS. FOGARTY-HARDWICK?

A YES.

[1086] Q DID YOU READ ELAINE WILKINS?

A YES.

Q HELEN DWOJAK?

A YES.

Q JOYCE REILY?

A YES.

Q LARRY LEAMAN?

A YES.

Q MARCIE VREEKEN?

A YES.

Q DR. MARJORIE MITCHELL?

A YES.

Q PATRICIA DUMAS?

A YES.

Q RACHEAL DAVIS?

A YES.

Q SUSAN HOLL?

A YES.

Q DR. BARBARA WARNER?

A YES.

Q CARY HARDWICK?

A YES, I THINK I DID.

Q AND JANICE BEACON?

A YES.

Q DID YOU ALSO READ DR. MITCHELL'S – WELL, EXCERPTS FROM DR. MITCHELL'S TESTIMONY FROM THE FAMILY [1087] COURT TRIAL?

A YES.

Q DID YOU ALSO READ PORTIONS OF MS. DAVIS'S TESTIMONY FROM THE JUVENILE COURT TRIAL?

A YES.

Q DID YOU ALSO REVIEW VARIOUS RESPONSES TO INTERROGATORIES OR WRITTEN QUESTIONS BETWEEN THE PARTIES TO THIS CASE AND RESPONSES TO REQUESTS FOR ADMISSIONS?

A YES.

* * *

[1088] Q ALL RIGHT. I WOULD LIKE TO BEGIN BY ASKING YOU, DID YOU FORM AN

OPINION REGARDING – AN OVERALL GENERAL OPINION OF WHAT HAPPENED IN TERMS OF THE SOCIAL SERVICES AGENCY'S HANDLING OF THIS CASE?

A YES.

* * *

[1110] AFTER REVIEWING ALL OF THESE MATERIALS AND EVALUATING THE PLAINTIFF, DID YOU REACH A DIAGNOSIS AS TO HER CURRENT PSYCHOLOGICAL CONDITION?

AND, HERE, I'M NOT ASKING FOR HER CONDITION BACK IN 2000 TO 2004. WE'RE GOING TO ASK THE DOCTORS WHO TREATED HER THEN ABOUT THAT. BUT HER CURRENT CONDITION.

A SHE WAS MODERATELY TO SEVERELY DEPRESSED.

Q ANYTHING ELSE?

A I THINK SHE HAS PERIODS OF ANXIETY AND CERTAINLY SOME PSYCHOPHYSIOLOGICAL REACTIONS.

Q WHAT DO YOU MEAN BY THAT?

A GRINDING OF TEETH, GASTROINTESTINAL PROBLEMS. MOST OF US HAVE SOME KIND OF TARGET PHYSICAL SYMPTOMS WHEN WE GET REALLY UPSET OR DEPRESSED AND WE'LL FEEL PAINS OR DYSFUNCTION IN THAT AREA.

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[1111] Q YEAH. WELL, HOW DID YOU PERCEIVE THE MOTHER'S ROLE WITH THE CHILDREN BEFORE THEY WERE TAKEN FROM HER?

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THE WITNESS: I WAS RAISED ON A FARM. WE HAD BANTY HENS. BANTY HENS ARE LITTLE CHICKENS. AND I HAD A HOLSTEIN BULL, AND HE HAD A BIG RING IN HIS NOSE. AND THAT BULL COULD GO ANYWHERE HE WANTED EXCEPT WHEN THE BANTY HEN WAS THERE WITH HER CHICKS, AND SHE WOULD TAKE HIM ON AND HE WOULD TURN AND RUN.

I THINK SHE DEDICATED HER LIFE TO PROTECTING HER CHILDREN AND DOING THE BEST FOR HER CHILDREN. I THINK THAT THAT'S REALLY HOW SHE SAW HERSELF.

BY MS. SUTHERLAND:

Q AND A MOTHER LIKE YOU JUST DESCRIBED –

A THE BANTY HEN.

Q A MOTHER LIKE YOU JUST DESCRIBED – IS THE LOSS OF THAT CHILD, FOR THAT KIND OF A PARENT, MORE PROFOUND THAN, SAY, A PARENT WHO DIDN'T HAVE SUCH A CLOSE RELATIONSHIP?

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[1112] THE WITNESS: YES. MUCH MORE SEVERE.

BY MS. SUTHERLAND:

Q CAN YOU EXPLAIN WHY?

A WELL, IF THE RELATIONSHIP IS REALLY FUNCTIONAL AND YOU DEDICATE A TREMENDOUS AMOUNT OF YOUR OWN PSYCHIC ENERGY AND INTEREST AND CONCERN WITH PROTECTING THE CHILDREN, AND THEN YOU'RE PLACED IN A SITUATION WHERE (A) THERE ARE NO CHILDREN OR (2) YOU CAN NO LONGER PROTECT THEM, THEN IT CAUSES WHAT EUPHEMISTICALLY WE CALL A NARCISSISTIC WOUND.

A NARCISSISTIC WOUND IS SOMETHING THAT HURTS YOU SO BAD, RIGHT AT THE CORE OF YOUR SOUL OR YOUR HEART OR WHATEVER, THAT IT SHAKES UP AND ESSENTIALLY DESTROYS YOUR ENTIRE WORLD.

SHE WAS DEVASTATED, WOULD BE DEVASTATED.

Q ARE YOU SAYING WHEN YOU MENTION A NARCISSISTIC WOUND THAT APPLIES TO DEANNA?

A YES, I BELIEVE SO.

* * *

Q AND THE DEPRESSION THAT SHE'S CURRENTLY EXPERIENCING – THE ANXIETY AS WELL – DO YOU RELATE THOSE BACK TO THE REMOVAL OF HER CHILDREN OR TO SOME OTHER CAUSE?

A I THINK IT'S AT THIS POINT IN TIME TO THE [1113] REMOVAL OF THE CHILDREN.

Q EXPLAIN YOUR REASON OR REASONS WHY.

A BECAUSE THAT'S THE THING – THAT'S THE BIGGEST PSYCHOSOCIAL STRESSOR THAT SHE'S HAD. THERE IS CERTAINLY EVIDENCE THAT HER PSYCHOLOGICAL STRESS LEVEL INCREASED WITH THE REMOVAL OF THE CHILDREN.

Q WHAT ABOUT HER EFFORTS TO REESTABLISH A RELATIONSHIP WITH THE CHILDREN? HOW DID THAT PLAY INTO HER CURRENT CONDITION?

A I THINK THAT – THAT FURTHER SUBSTANTIATES THAT SHE'S A BANTY HEN AND THAT IT WAS A WAY OF TRYING TO REPAIR HER WORLD AND TO BE THERE FOR HER CHILDREN.

SO IT WASN'T JUST HERSELF; IT WAS REALLY FOCUSED ON THE CHILDREN AND THE CHILDREN'S WORLD. AND SHE WANTED TO BE A PART OF THAT AND SHE DID EVERYTHING SHE COULD TO DO THAT.

Q DO YOU CONSIDER THE MOTHER'S DEPRESSION, ANXIETY, THIS NARCISSISTIC WOUND AND HER CONDITION TODAY – DO YOU CONSIDER THAT TO BE A PERMANENT CONDITION OR A NONPERMANENT CONDITION?

A I THINK IT'S GOING TO BE LONG-TERM. I THINK THAT IT CAN BE – WITH THE RIGHT TYPE OF INTERVENTION, IT CAN BE TREATED.

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[1114] Q WHAT DO YOU MEAN BY "THE APPROPRIATE TYPE OF PSYCHOTHERAPY"?

A I THINK SHE NEEDS SOME HELP IN TERMS OF DEALING WITH THE LOSS AND THE ONGOING ISSUES OF THE CHILDREN GROWING UP.

I MEAN, SHE MISSED A WHOLE SEGMENT, A WHOLE ESSENTIAL PART OF THEIR LIVES DEVELOPMENTALLY, AND SHE NEEDS TO CATCH UP WITH THAT AND LEARN HOW TO DEAL WITH THAT.

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[1116] Q AFTER HAVING REVIEWED ALL THESE MATERIALS IN THIS CASE, DID YOU ALSO FORM AN OPINION AS TO THE SOCIAL SERVICES AGENCY'S HANDLING OF THIS CASE?

A YES.

Q WHAT ARE YOUR OPINIONS – YOUR OVERALL OPINIONS OF THEIR HANDLING OF THIS CASE?

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THE WITNESS: I THINK THAT THEY HAD POLICIES AND PROCEDURES THAT DID NOT REQUIRE APPROPRIATE INTERVENTION.

I THINK THAT THEY HAVE – THEY HAD A SYSTEM WHERE, WHEN THERE IS A DIFFERENCE OF OPINION BETWEEN THE CLIENT OR THE CHILDREN OR THE SOCIAL WORKER, THAT THE SOCIAL WORKER TAKES PRECEDENCE.

I THINK THEY HAVE A POLICY AND PRACTICES OF DISBELIEVING THE CLIENT AND THE CHILDREN.

I THINK THAT THEY PUT THE INTERESTS OF PROTECTING THE SOCIAL WORKER OVER THE BEST INTERESTS OF THE CHILD.

I THINK THAT THEY ACCUSED THE MOTHER OF THINGS AS A MATTER OF COURSE, LIKE JUST BOILERPLATE ACCUSATIONS WITHOUT JUSTIFICATION OR WARRANT.

[1117] I THINK THEY HAVE A PROCEDURE AND A POLICY THAT SAYS THAT THEY DON'T EVEN HAVE TO FOLLOW SOME OF THEIR OWN POLICIES AND PROCEDURES.

I THINK, CONTRARY TO FEDERAL GUIDELINES, THEY EXPERIMENTED WITH THE PARENT-CHILD RELATIONSHIP BY REMOVING THE CHILD WITH KNOWN HARM, BECAUSE EVERY SOCIAL WORKER KNOWS THAT THERE IS HARM WHEN YOU MOVE CHILDREN. YOU HAVE TO BALANCE THAT OUT.

AND THE ONLY THING I FOUND IN THE CASE WAS THAT THE SOCIAL WORKERS WANTED TO ASSESS WHAT KIND OF INFLUENCE THE MOTHER WAS HAVING ON THE CHILDREN; AND, YOU KNOW, THAT'S INAPPROPRIATE AND IT'S UNPROFESSIONAL AND IT'S NOT A VALID JUSTIFICATION. IT'S SOME ISSUES OF THE POWER OF THE SOCIAL WORKER.

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[1118] Q BEFORE THE AGENCY BECAME INVOLVED IN THE LIVES OF KENDALL HARDWICK, PRESLIE HARDWICK, AND DEANNA FOGARTY-HARDWICK, DID THE MOTHER AND CHILDREN ENJOY A FUNCTIONAL MATERNAL-CHILD RELATIONSHIP?

A YES.

Q ARE YOU FAMILIAR WITH THE PHRASE "AGENCY CASE"?

A YES.

Q WHAT DOES THAT MEAN?

A IT'S A CASE WHERE EVERYONE IN THE SOCIAL SERVICES AGENCY KNOWS IT AND EVERYBODY HAS OPINIONS ABOUT IT. IT JUST KIND OF BECOMES A CELEBRITY CASE, AND USUALLY NOT IN A POSITIVE WAY. AND SO THEN THERE IS DIVISIONS WITHIN THE RANKS ABOUT IF THIS IS GOOD OR IF THIS IS BAD, AND IT'S SOMEWHAT DIVISIVE.

I THINK THIS IS REALLY EVIDENT IN THE FACT THAT THERE WERE ACCUSATIONS MADE AGAINST THE MOTHER BY SOCIAL WORKERS SAYING SHE WAS MENTALLY ILL AND HAD A PERSONALITY DISORDER WHEN THERE WASN'T ANY EVIDENCE TO SUPPORT THAT.

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[1138] Q CAN AN ORGANIZATION'S POLICIES EXIST IN BOTH WRITTEN AND UNWRITTEN FORM?

A ABSOLUTELY.

Q CAN YOU DESCRIBE HOW THOSE POLICIES MIGHT EXIST IN UNWRITTEN FORM?

A EVERY ORGANIZATION HAS A CULTURE. SOME ARE KIND OF LIKE FAMILIES. SOME OF THEM ARE FUNCTIONAL FAMILIES; SOME OF THEM ARE DYSFUNCTIONAL FAMILIES.

THOSE CULTURES, THOSE ORGANIZATIONS TEACH PEOPLE WHAT'S ACCEPTABLE BEHAVIOR AND IN THAT GROUP. THEY TEACH THEM

USUALLY NOT TO QUESTION CERTAIN KINDS OF [1139] POLICIES.

YOU KNOW, IN THIS CASE, THERE IS A STANDARD BOILERPLATE. THESE SOCIAL WORKERS TESTIFIED THAT IF THERE'S AN ALLEGATION OF ABUSE OF ONE PARENT, THEN THEY AUTOMATICALLY MAKE AN ACCUSATION AGAINST THE OTHER. THAT MAKES ABSOLUTELY NO CLINICAL SENSE, AND IT'S JUST PART OF THAT UNWRITTEN POLICY.

NOW, HAVING THE BOILERPLATE IS A WRITTEN POLICY, YOU KNOW, AND THERE ARE STANDARDS THAT NEED TO BE MET BEFORE YOU CAN PUT THAT IN. YOU KNOW, THOSE STANDARDS WEREN'T MET IN THIS CASE. BUT BEFORE YOU CAN PUT THAT IN.

THE UNWRITTEN RULE IS THAT WE ALWAYS DO IT THAT WAY. AND IT'S A WAY OF INCREASING THE POWER AND THE CONTROL OF THE ORGANIZATION OR THE AGENCY.

Q DID YOU DISCOVER ANY EFFORTS AT RECONCILIATION OR CORRECTION ONCE THE PROBLEM WITH MS. VREEKEN AND MS. FOGARTY ESCALATED TO A REMOVAL OF THE CHILDREN?

A NONE.

Q WOULD YOU HAVE EXPECTED TO SEE THAT?

A YES.

Q WHAT WOULD YOU HAVE EXPECTED TO SEE?

A I WOULD HAVE EXPECTED THAT THERE BE SOME KIND OF MEDIATION, INTERVENTION, OR CONSULTATION IN TERMS OF BUILDING THAT RELATIONSHIP, GETTING IT BACK ON TRACK.

THAT BEING ABSENT, I WOULD EXPECT THERE WOULD [1140] BE KIND OF LIKE A SPECIAL MONITOR THAT KIND OF MONITORS, YOU KNOW, BOTH PEOPLE.

Q DID YOU DISCOVER ANY EVIDENCE THAT THE AGENCY INVESTIGATED THE MOTHER'S COMPLAINT THAT THE SOCIAL WORKER HAD LIED IN COURT?

A NOT IN ANY REAL SENSE. I THINK THEY JUST KIND OF DISCOUNTED IT.

Q WOULD YOU HAVE EXPECTED TO SEE SOME KIND OF AN INVESTIGATION?

A YES.

Q WHY WOULD THAT BE?

A BECAUSE THIS AGENCY HAS A TREMENDOUS AMOUNT OF POWER. AND IN ADDITION TO BEING SOCIAL WORKERS, THEY'RE ALSO AGENTS OF SOCIAL CONTROL.

AND THAT ORGANIZATIONS THAT HAVE THAT KIND OF POWER AND HAVE THAT KIND OF INFLUENCE NEED SOME KIND OF INTERNAL AFFAIRS OR REVIEW PROCESS. AND WHEN THERE'S SIGNS OF THAT KIND OF GOING ON OR THOSE KINDS OF ACCUSATIONS GOING ON, THEN A NEUTRAL PARTY NEEDS TO ATTEND TO THAT AND MAKE SURE THAT IT'S NOT EXTENDING OR BREAKING POLICIES AND TO TRY TO MAKE IT BETTER.

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[1144] Q IN YOUR REVIEW OF THE EVIDENCE IN THIS CASE, WERE THE DEFENDANT SOCIAL WORKERS MINDFUL OF PLAINTIFF'S RIGHTS AS THE MOTHER OF THESE TWO GIRLS?

A I DON'T BELIEVE SO.

Q WHY IS THAT?

A BECAUSE THE BEST WAY TO DETERMINE WHAT PEOPLE WANT TO DO IS TO OBSERVE THEIR BEHAVIOR, AND SOMEONE WHO WAS MINDFUL OF THOSE PARENTAL RIGHTS WOULD HAVE BEEN MORE BALANCED AND NEUTRAL IN THE ASSESSMENT. THEY WOULD HAVE FOLLOWED THE STANDARD ASSESSMENT GUIDELINES. THEY WOULD HAVE GATHERED MORE FACTS. THEY WOULD HAVE INTERVIEWED THE CHILDREN DIFFERENTLY, ESPECIALLY KENDALL, BECAUSE OF HER

CONDITION. THEY WOULD HAVE TRIED TO WORK IT OUT, WOULD HAVE NOT TAKEN SIDES. IT SEEMS TO ME THAT THEY REALLY TOOK SIDES WITH THE FATHER. AND THEY WOULD HAVE TOLD THE JUDGE ALL THE INFORMATION THE JUDGE NEEDED TO [1145] KNOW, BOTH POSITIVE AND NEGATIVE.

Q ALL RIGHT. LAST QUESTION.

EARLIER IN YOUR TESTIMONY YOU DESCRIBED WHAT AN AGENCY CASE IS.

DID THIS BECOME AN AGENCY CASE?

A THIS WAS AN AGENCY CASE.

Q WHY DO YOU BELIEVE THAT TO BE THE CASE?

A ONE, BECAUSE ALL THE HALLMARKS ARE THERE: STATEMENTS BY SOCIAL SERVICES THAT THIS IS A VERY DIFFICULT CASE; ACCUSATIONS ABOUT PEOPLE'S MENTAL STATUS WHEN IT'S UNJUSTIFIED; STATEMENTS ABOUT CHARACTERIZING THE PERSON AS HAVING A SILVER SPOON IN THEIR MOUTH WHEN, YOU KNOW, THAT ISN'T – THAT ISN'T TRUE. IT BECAME AN AGENCY CASE BECAUSE OF SOME OF DEANNA'S PAST – YOU KNOW, PAST ACHIEVEMENTS.

THERE'S AN INTERESTING STUDY CALLED "CELEBRITIES ON THE COUCH" THAT TALKS ABOUT AND ADDRESSES ISSUES WITH PEOPLE

THAT HAVE BEEN SUCCESSFUL AND HOW SOCIAL SERVICES AND MENTAL HEALTH PEOPLE OFTEN MISTREAT THEM. AND I THINK THIS WAS A CASE WHERE THE CHILDREN AND SHE WERE MISTREATED.

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[1146] KEVIN HARDWICK,

CALLED AS A WITNESS BY AND ON BEHALF OF THE PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

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[1147] Q MR. HARDWICK, WHAT'S YOUR RELATION TO CARY HARDWICK?

A HE'S MY BROTHER.

* * *

A YEAH, MY BIOLOGICAL BROTHER.

Q AND AT SOME POINT AFTER FEBRUARY 15, 2000, DID YOU BECOME AWARE THAT DEANNA'S CHILDREN HAD BEEN REMOVED FROM HER HOME?

A YES, I DID.

Q OKAY. AND YOU BECAME AWARE OF THE CIRCUMSTANCES OF THAT REMOVAL?

A YES, I DID.

Q OKAY. AND AT SOME POINT AFTER THE CHILDREN WERE REMOVED, DID YOU HAVE OCCASION TO CALL MS. VREEKEN OR SPEAK TO MS. VREEKEN IN RELATION TO HOW THE CASE WAS PROCEEDING AND THE NATURE OF THE REMOVAL?

A YES.

Q OKAY. DO YOU REMEMBER ABOUT WHEN THAT HAPPENED, THAT TELEPHONE – WAS IT TELEPHONE OR IN PERSON?

A IT WAS A TELEPHONE CALL.

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[1153] Q AT SOME POINT DID YOU TRY TO MOVE UP THE CHAIN AND TALK TO MS. VREEKEN'S SUPERVISOR?

A YES, I DID.

Q OKAY. ABOUT WHEN DID THAT HAPPEN?

A I THINK I SPENT A LITTLE TIME INVESTIGATING, TRYING TO SEE WHO IT WAS.

ABOUT SIX WEEKS LATER, I FINALLY WAS ABLE TO CONNECT WITH SOMEONE.

[1154] Q SO SOMETIME MAYBE IN APRIL OF 2000?

A IN APRIL. EARLY APRIL.

Q WHO WAS IT THAT YOU SPOKE WITH?

A A MISS DWOJAK.

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Q AND EXPLAIN FOR US, IF YOU COULD, THE SUBSTANCE OF THAT CONVERSATION WITH MS. DWOJAK?

A AT THIS POINT I JUST FELT IT WAS TIME TO MOVE UP THE CHAIN BECAUSE I DIDN'T FEEL THAT ANYONE WAS GIVING ME ANY REASONABLE ANSWERS AS TO WHY DEANNA HARDWICK WOULD BE TAKEN – THE KIDS WOULD BE TAKEN FROM HER AND THEY WOULD BE PLACED IN THIS FACILITY, AND IT SEEMED THE NATURAL THING TO DO WAS SORT OF GO UP THE CHAIN OF COMMAND.

SO I HAD LEFT HER A MESSAGE JUST SAYING I WOULD LIKE TO KNOW A LITTLE BIT MORE AS TO WHY MY NIECES HAVE BEEN TAKEN FROM THEIR MOTHER AND WHY I'M ON MONITORED VISITS ONCE A WEEK. IT'S – YOU KNOW, IT'S IMPACTING MY RELATIONSHIP WITH THEM.

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[1155] Q MS. DWOJAK – YOU SAID SHE CALLED YOU BACK?

A SHE DID CALL ME BACK.

Q HOW DID THAT – HOW DID THAT TELEPHONE CALL GO?

A I HAD LEFT HER A MESSAGE SPECIFICALLY THAT – YOU KNOW, I'D HOPED TO JUST ADDRESS THESE TWO THINGS IN A CALM DEMEANOR, BECAUSE I HAD RECENTLY HAD A HEART ATTACK AND I WASN'T DOING TOO WELL EMOTIONALLY AT THIS TIME PERIOD.

SO I WAS REALLY EXPECTING JUST – CAN YOU JUST GIVE ME A COUPLE ANSWERS. AND, REALLY, WHAT I RECALL FROM THE CONVERSATION IS HER DEMEANOR WAS VERY ATTACKING FROM THE MOMENT WE STARTED TO SPEAK.

Q HOW DO YOU MEAN? WHAT DO YOU MEAN BY "ATTACKING"?

A WELL, JUST ABUSIVE IN HER TONE. HER TONE WAS VERY JUST AGGRESSIVE, IF THAT MAKES SENSE. I DON'T REMEMBER – I CAN'T TELL YOU THE EXACT WORDS THAT SHE [1156] USED, BUT I DO REMEMBER THAT. I REMEMBER A COUPLE STATEMENTS SHE EVENTUALLY SAID, BUT I DON'T REMEMBER – I JUST REMEMBER THAT IT STARTED OFF VERY BADLY.

Q YOU SAY YOU REMEMBER A COUPLE OF STATEMENTS THAT SHE SAID. WHAT WERE THOSE STATEMENTS?

A EVENTUALLY, AS WE GOT TO ME ASKING SOME QUESTIONS, SHE MADE THE STATEMENT – I DO RECALL THE STATEMENT

THAT SHE MADE THAT MY ENTIRE FAMILY WAS – I DON'T KNOW IF SHE USED THE WORD "CRAZY" OR SOMETHING LIKE THAT.

Q OKAY.

A AND THAT JUST KIND OF SHOCKED ME, BECAUSE WE HAD NEVER MET. I KNEW SHE HAD NOT MET MOST OF MY FAMILY.

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Q DID YOU ASK HER WHY YOU HAD BEEN PUT ON MONITORED VISITS?

A I TRIED TO ASK HER WHY I WAS PLACED ON MONITORED VISITS, YES.

Q DID SHE RESPOND TO YOUR INQUIRY?

A SHE DID.

Q AND WHAT DID SHE SAY?

A UM, I STARTED TO GIVE HER THE REASON THAT [1157] MS. VREEKEN HAD GIVEN ME; AND SHE DIDN'T RESPOND TO IT, SO I ASKED HER AGAIN.

I SAID, "I THINK I HAVE A RIGHT TO KNOW WHY I'M PLACED ON MONITORED VISITS."

AND SHE SAID, "BECAUSE I SAID SO," THAT I RECALL.

Q "BECAUSE I SAID SO."

DID YOU RESPOND TO HER STATEMENT AT ALL, "BECAUSE I SAID SO"?

A I SAID – OH, YEAH. ABSOLUTELY.

I SAID, "THAT'S NOT REALLY A REASON. I NEED TO KNOW – I'D LIKE TO KNOW WHY IT IS THAT I'M GOING – THAT I'M BEING PUT ON THESE."

I HIT HER UP ON THAT TWO OR THREE TIMES IN A ROW BECAUSE SHE WOULDN'T ANSWER THE QUESTION. THE ONLY TIME SHE ANSWERED IT WAS THE ONE TIME WHEN SHE SAID "BECAUSE I SAID SO."

Q OKAY. AND HOW DID THE CONVERSATION – WELL, LET ME ASK YOU THIS FIRST: WAS THERE ANYTHING ELSE THAT YOU RECALL, AS YOU SIT HERE TODAY, THAT PASSED BETWEEN THE TWO OF YOU DURING THAT TELEPHONE CALL?

A NOT DURING THE CALL, NO.

Q WHAT DO YOU MEAN NOT DURING THE CALL? WAS THERE –

A WELL, IT'S JUST THAT IT ENDED RATHER ABRUPTLY WITH HER HANGING UP ON ME WHILE I WAS STILL ASKING HER [1158] SOME QUESTIONS.

Q OKAY. SO SHE ACTUALLY MID-SENTENCE – WAS IT MID-SENTENCE?

A YES.

Q JUST HUNG UP THE PHONE?

A SHE HUNG UP THE PHONE ON ME.

* * *

[1160] Q DID YOU EVER EITHER NOTIFY OR FILE A COMPLAINT OR ANY OTHER COMMUNICATION WITH ANYBODY FURTHER UP THE CHAIN IN SOCIAL SERVICES BESIDES MS. DWOJAK?

* * *

A WHEN I SENT A LETTER TO MS. DWOJAK, I HAD COPIED SEVERAL PEOPLE TRYING TO, ONCE AGAIN, SEE WHERE ELSE I COULD GO UP THE LADDER. I HAD DONE SOME INVESTIGATION AND GOTTEN SOME NAMES, AND I MADE SURE THOSE LETTERS GOT OFF TO THOSE PEOPLE,

* * *

[1161] Q I'M GOING TO SHOW YOU AN APRIL 8TH LETTER, THE LAST PAGE OF THE LETTER.

IF YOU CAN LOOK THROUGH THE FIRST AND SECOND PAGE AND LET ME KNOW IF YOU RECOGNIZE THAT LETTER AS BEING THE LETTER THAT YOU SENT TO MS. DWOJAK AFTER YOUR TELEPHONE CONVERSATION WITH HER.

A YES, IT'S A LETTER I WROTE.

Q OKAY. AND IN THAT LETTER DID YOU DESCRIBE WHAT YOU DESCRIBED HERE FOR US TODAY.

A YES, I BELIEVE I HAVE.

* * *

[1162] Q IF YOU LOOK AT THE LAST PAGE OF THAT LETTER, DOES THAT REFRESH YOUR RECOLLECTION AS TO WHO IN THE CHAIN OF COMMAND AT SOCIAL SERVICES YOU C.C.'D THAT LETTER TO?

A YES. AND I CAN – YES, IT DOES.

Q AND WHO WAS THAT?

A MICHAEL MCMICHAEL. AND SO HE'S LISTED HERE AS PROGRAM MANAGER.

SO I HAD NEVER MET THIS GENTLEMAN; BUT, YOU KNOW, I ASKED SOME QUESTIONS, YOU KNOW, WHO WAS KIND OF IN CHARGE HERE, AND I BELIEVE HE WAS THAT PERSON.

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[1163] Q DID ANYBODY AT SOCIAL SERVICES EVER RESPOND TO YOUR LETTER?

A NO.

* * *

[1169] Q NOW, THE LETTER THAT YOU WROTE TO MS. DWOJAK – OTHER THAN MS. DWOJAK AND MR. MCMICHAEL, WERE THERE

OTHERS ON YOUR LIST OF COPIES THERE THAT WERE IN ANY WAY THE SUPERIORS OR IN THE CHAIN OF TITLE – CHAIN OF TITLE – CHAIN OF COMMAND, SO TO SPEAK, AT SOCIAL SERVICES AGENCY?

* * *

IF I UNDERSTAND YOUR QUESTION, THE ONLY REASON I CHOSE THOSE PEOPLE IS I RECOGNIZED OR I HAD RESEARCHED THAT THESE WERE PEOPLE THAT WERE UP – HIGHER UP THAN MS. DWOJAK.

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
	)	
VS.	)	
COUNTY OF ORANGE,	)	NO. 01CCO2379
MARCIE VREEKEN,	)	
ELAINE WILKINS, AND	)	
HELEN DWOJAK,	)	
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

FEBRUARY 28, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:
LAW OFFICES OF SONDRA S. SUTHERLAND
BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:
BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[1236] (THE DEPOSITION TESTIMONY OF HELEN DWOJAK WAS READ INTO THE RECORD AS FOLLOWS:)

* * *

[1240] "QUESTION: WHAT WAS YOUR JOB TITLE AT THE TIME YOU RETIRED?

"ANSWER: SENIOR SOCIAL SERVICES SUPERVISOR.

"QUESTION: ALL RIGHT. SO YOU WERE SERVING IN THAT CAPACITY FROM 1986 UNTIL YOU RETIRED IN 2006; IS THAT CORRECT?

"ANSWER: IT IS.

* * *

"QUESTION: WHAT WERE YOUR SPECIFIC JOB DUTIES AS A SENIOR SOCIAL [1241] SERVICES SUPERVISOR AS OF THE YEAR 2000?

"ANSWER: WELL, BEING MY JOB WAS TO TRAIN AND ASSIST SOCIAL WORKERS IN DOING THEIR JOB, MAINTAIN THE NEED FOR A PRIMARY GOAL – AND THAT IS THE PROTECTION OF CHILDREN. AND THEN ASSIST IN FAMILY REUNIFICATION; THAT IS, SO LONG AS WE COULD SAFELY PLACE A CHILD AT HOME, THAT'S WHAT WE WOULD DO.

"I DID A LOT OF TRAINING IN INVESTIGATIONS. I WAS THE TRAINING SUPERVISOR, SO I

TRAINED WORKERS ON HOW TO WRITE COURT REPORTS, HOW TO INVESTIGATE CASES, HOW TO DEAL WITH THE JUVENILE COURT.

* * *

[1242] "QUESTION: IS THERE ANYONE WITH ORANGE COUNTY SOCIAL SERVICES AGENCY THAT WAS MORE RESPONSIBLE THAN YOU IN ACCOMPLISHING THOSE TASKS THAT YOU JUST OUTLINED FOR ME?

"ANSWER: YES. I HAD A PROGRAM MANAGER.

"QUESTION: WHO WAS THAT?

"ANSWER: AT THE TIME OF THIS CASE IT WAS MICHAEL MCMICHAEL.

"QUESTION: AND IS THAT THE PERSON TO WHOM YOU REPORTED?

"ANSWER: YES.

"QUESTION: WAS IT YOU OR MICHAEL MCMICHAEL WHO WAS RESPONSIBLE FOR TRAINING AND ASSISTING SOCIAL WORKERS IN DOING THEIR JOB?

"ANSWER: IT WAS ME.

* * *

[1243] "QUESTION: WAS IT YOU OR MR. MCMICHAEL WHO WAS RESPONSIBLE FOR

TRAINING STAFF ON HOW TO WRITE COURT REPORTS?

"ANSWER: IT WAS ME.

"QUESTION: WAS IT YOU OR MR. MCMICHAEL WHO WAS RESPONSIBLE FOR TRAINING STAFF ON HOW TO INVESTIGATE CASES?

"ANSWER: IT WAS ME.

"QUESTION: WAS IT YOU OR MR. MCMICHAEL WHO WAS RESPONSIBLE FOR TRAINING STAFF ON HOW TO DEAL WITH THE JUVENILE COURT?

"ANSWER: IT WAS ME.

"QUESTION: AND YOU WERE AN EMPLOYEE FOR ORANGE COUNTY, RIGHT?

"ANSWER: YES.

* * *

"QUESTION: DID YOUR JOB TITLE OR [1244] JOB DUTIES EVER CHANGE, OTHER THAN HOW YOU ALREADY EXPLAINED TO ME?

"ANSWER: NO.

"QUESTION: WERE YOU RESPONSIBLE FOR SUPERVISING SENIOR SOCIAL WORKER MARCIE VREEKEN?

"ANSWER: YES.

* * *

[1246] "QUESTION: AND YOU NEVER DISCIPLINED MS. VREEKEN FOR ANYTHING?

"ANSWER: NO.

"QUESTION: DID YOU EVER COUNSEL HER FOR ANYTHING?

"ANSWER: IN THE WAY OF DISCIPLINE?

"QUESTION: YES.

"ANSWER: NO.

"QUESTION: YOU NEVER SAW ANYTHING SHE DID THAT WAS SUBSTANDARD IN JOB PERFORMANCE?

"ANSWER: NO.

* * *

[1251] "QUESTION: BUT YOU NEVER GAVE MS. FOGARTY THE OPPORTUNITY TO TELL HER SIDE OF THE STORY, RIGHT?

"ANSWER: I DIDN'T CALL HER.

"QUESTION: DID YOU COMMUNICATE WITH HER IN ANY WAY, SHAPE, OR FORM, TO OBTAIN INFORMATION FROM HER ABOUT WHAT HAPPENED ON FEBRUARY 15, 2000?

"ANSWER: NO.

* * *

[1252] "QUESTION: ALL RIGHT. WHAT TRAINING, IF ANY, DID YOU PERSONALLY

PROVIDE TO MS. VREEKEN BEFORE FEBRUARY 15TH OF 2000?

"ANSWER: HOW TO WRITE COURT REPORTS, INTERVIEWING SKILLS, AND RISK ASSESSMENT.

"QUESTION: HOW MANY HOURS DID YOU SPEND TEACHING MS. VREEKEN INTERVIEWING SKILLS BEFORE FEBRUARY 15?

"ANSWER: FOUR HOURS.

"QUESTION: HOW MANY HOURS DID YOU SPEND TEACHING MS. VREEKEN RISK ASSESSMENT BEFORE FEBRUARY 15, 2000?

"ANSWER: APPROXIMATELY TWO

* * *

[1254] "QUESTION: WHAT WAS YOUR ROLE IN THE HARDWICK CASE IN PARTICULAR? WHAT WERE YOUR AREAS OF RESPONSIBILITY, THAT IS?

"ANSWER: SUPERVISING THE ASSIGNED SOCIAL WORKER TO MAKE SURE THAT REGULATIONS WERE FOLLOWED AND THAT THE INVESTIGATION WAS PROPERLY DONE AND THAT A COURT REPORT, A COMPREHENSIVE COURT REPORT, WAS GIVEN TO THE COURT.

"QUESTION: ANYTHING ELSE?

"ANSWER: NOT THAT I CAN THINK OF RIGHT NOW.

"QUESTION: IN DOING THOSE THINGS THAT YOU JUST DESCRIBED, YOU WERE ACTING IN THE PERFORMANCE OF YOUR OFFICIAL DUTIES OF THE ORANGE COUNTY SOCIAL [1255] SERVICES AGENCY, WERE YOU NOT?

"ANSWER: YES.

* * *

[1258] "QUESTION: WHAT ROLE DID YOU PLAY AS OF FEBRUARY 2000 IN MAKING THE RECOMMENDATIONS TO THE JUVENILE COURT IN MATTERS LIKE THE KENDALL AND PRESLIE HARDWICK MATTER?

"ANSWER: I DISCUSSED THE CASE WITH THE ASSIGNED WORKER. I APPROVED COURT REPORTS" – EXCUSE ME.

"I APPROVED THE COURT REPORTS.

"QUESTION: DID YOU APPROVE ALL OF THE COURT REPORTS IN THE KENDALL AND [1259] PRESLIE HARDWICK MATTER?

"ANSWER: YES.

"QUESTION: BEFORE APPROVING THOSE REPORTS, DID YOU READ THEM?

"ANSWER: YES.

* * *

"QUESTION: ALL RIGHT. NOW, WHEN YOU SAY THAT MS. VREEKEN HAD AUTHORITY TO

MAKE RECOMMENDATIONS BUT YOU MAKE THE DECISIONS, WHAT DECISIONS ARE YOU REFERRING TO?

"ANSWER: I APPROVE ALL OF THE RECOMMENDATIONS IN EVERY COURT REPORT IF I FIND THEM PROPER. IF NOT, WE TALK ABOUT IT.

* * *

[1260] "QUESTION: IN THE HARDWICK MATTER DID ANYONE EVER RECOMMEND TO YOU THAT THE CHILDREN BE RELEASED HOME TO THEIR MOTHER?

"ANSWER: NO.

"QUESTION: DID YOU, YOURSELF, SUGGEST THAT THE CHILDREN BE RELEASED HOME TO THEIR MOTHER?

"ANSWER: NO.

"QUESTION: WAS THERE ANYONE WITH YOUR AGENCY WHO WAS MORE RESPONSIBLE THAN YOU AS OF FEBRUARY 2000 TO ASSURE THE ACCURACY OF THE COURT REPORT ADDENDUMS AND OTHER REPORTS THAT WERE SUBMITTED TO THE JUVENILE COURT IN THE HARDWICK MATTER?

"ANSWER: NO.

* * *

[1262] "QUESTION: BY SIGNING THE REPORTS IN THE HARDWICK MATTER, YOU WERE APPROVING THEIR CONTENTS; CORRECT?

"ANSWER: CORRECT.

"QUESTION: AND YOU READ EACH OF THOSE REPORTS BEFORE SIGNING THEM?

"ANSWER: I DID.

* * *

[1264] "QUESTION: AND YOU CONTINUED TO SUPERVISE THIS CASE AFTER FEBRUARY 17?

"ANSWER: YES.

* * *

[1265] "QUESTION: WHEN THE REPORT STATES THAT THE MOTHER MADE A STATEMENT THAT SHE STRONGLY DENIED EVER MAKING AND THAT WAS THE BASIS FOR THE JUDGE REMOVING THE CHILDREN FROM HER CARE, ISN'T THAT SOMETHING THAT YOU WOULD WANT [1266] TO KNOW? YOU WOULD WANT TO INVESTIGATE TO MAKE SURE IT'S TRUTHFUL?

"ANSWER: NO.

* * *

[1267] "QUESTION: DID YOU, OR ANYONE ELSE WITH THE ORANGE COUNTY SOCIAL [1268] SERVICES AGENCY, TAKE ANY STEPS

WHATSOEVER AT ANY TIME TO INVESTIGATE DEANNA'S CLAIM THAT SHE DID NOT SAY THOSE THINGS AND IT WAS IN FACT MS. VREEKEN WHO DID?

"ANSWER: NO.

* * *

"QUESTION: * * * CAN YOU RECALL ANY OCCASION DURING YOUR LENGTHY CAREER IN SOCIAL SERVICES WHERE YOU TOOK THE WORD OF A PARENT OVER THE WORD OF A SOCIAL WORKER SUBORDINATE OF YOURS?

"ANSWER: I CAN'T RECALL ONE IN MY UNIT.

* * *

[1269] "QUESTION: DO YOU KNOW ANY BASIS FOR THE JUVENILE COURT TO REMOVE THE CHILDREN FROM THEIR MOTHER ON FEBRUARY 17TH, OTHER THAN THE STATEMENTS MADE BY MS. VREEKEN AND MS. WILKINS TO THE COURT THAT DAY?

"ANSWER: I DON'T KNOW.

* * *

"QUESTION: ARE YOU AWARE OF ANY EVIDENCE THAT DEANNA FAILED TO SUPERVISE HER CHILDREN ADEQUATELY?

"ANSWER: NO.

"QUESTION: ARE YOU AWARE OF ANY [1270] EVIDENCE THAT DEANNA FAILED TO PROTECT HER CHILDREN?

"ANSWER: NO.

"QUESTION: WHAT EVIDENCE ARE YOU AWARE OF EXISTS TO SUPPORT THE ALLEGATIONS IN THE PETITION AGAINST DEANNA?

"ANSWER: IN CASES OF SEXUAL ABUSE, WHERE ONE PARENT IS THE PERPETRATOR, THE LEGAL LANGUAGE IS THAT THE OTHER PARENT FAILED TO PROTECT THE CHILD.

* * *

[1271] "QUESTION: AND SO YOUR PRACTICE, AS OF FEBRUARY 2000, WAS IN EVERY CASE OF ALLEGED SEXUAL ABUSE TO ALLEGE AS AGAINST THE OTHER PARENT – THAT IS, THE PARENT NOT ALLEGED TO HAVE SEXUALLY ABUSED THE CHILDREN – THAT THAT PARENT FAILED TO PROTECT THEIR CHILDREN?

"ANSWER: THAT'S CORRECT.

"QUESTION: AND THAT WOULD BE THE CASE WHETHER OR NOT THERE WAS ANY EVIDENCE TO SUPPORT – AT ALL TO SUPPORT THE ALLEGATION?

"ANSWER: THAT'S CORRECT.

* * *

[1272] "QUESTION: ARE YOU AWARE OF ANY WRITTEN POLICY WHICH POSES ANY LIMITATION ON THE ALLEGATIONS YOUR AGENCY CAN MAKE AGAINST A PARENT WHERE THERE IS NO EVIDENCE TO SUPPORT THE ALLEGATION?

"ANSWER: I'M NOT AWARE OF ANY.

"QUESTION: DID YOU EVER DISCLOSE TO THE JUVENILE COURT IN THE HARDWICK [1273] MATTER THAT THERE WAS NO EVIDENCE TO SUPPORT THE ALLEGATIONS THAT DEANNA FAILED TO PROTECT HER CHILDREN?

"ANSWER: NO, I DIDN'T.

"QUESTION: DID YOU EVER DISCLOSE TO THE COURT THAT THERE WAS NO EVIDENCE TO SUPPORT THE ALLEGATION THAT SHE FAILED TO SUPERVISE HER CHILDREN?

"ANSWER: NO, I DIDN'T.

"QUESTION: DID YOU EVER DISCLOSE TO THE JUVENILE COURT THAT THERE WAS NO EVIDENCE TO SUPPORT THE ALLEGATION THAT DEANNA POSED A RISK OF PHYSICAL INJURY TO HER CHILDREN?

"ANSWER: NO.

* * *

"QUESTION: ARE YOU AWARE OF ANY EVIDENCE THAT THERE WAS A SUBSTANTIAL

DANGER TO THE PSYCHOLOGICAL OR EMOTIONAL HEALTH OF THE CHILDREN IF THEY WERE [1274] RETURNED TO THEIR MOTHER AS OF FEBRUARY 18TH, 2000?

"ANSWER: NO.

* * *

"QUESTION: YOUR AGENCY HAS A TREMENDOUS AMOUNT OF POWER TO AFFECT A PERSON'S CHILDREN AND FAMILY, DON'T YOU?

"ANSWER: SOME SEE IT THAT WAY.

* * *

[1275] "QUESTION: IS THERE ANYONE ELSE BESIDES YOU AND MS. VREEKEN WHO ARE AUTHORIZED TO RELEASE THE CHILDREN TO THEIR PARENT IN THE HARDWICK CASE?

"ANSWER: NO.

"QUESTION: DID YOU EVER AUTHORIZE THE RELEASE OF KENDALL OR PRESLIE HARDWICK BACK TO THEIR MOTHER?

[1276] "ANSWER: NO.

"QUESTION: DID MS. VREEKEN?

"ANSWER: NOT TO MY KNOWLEDGE.

"QUESTION: DID ANYONE ELSE WITH YOUR AGENCY?

"ANSWER: NO.

"QUESTION: ARE YOU AWARE OF ANY EVIDENCE THAT EXISTED AS OF FEBRUARY 2000 THAT DEANNA WAS IN ANY MANNER AN UNSUITABLE CARETAKER?

"ANSWER: NO.

* * *

[1278] "QUESTION: DO YOU AND MS. VREEKEN OCCASIONALLY MEET TO DISCUSS THE HARDWICK CASE?

"ANSWER: IN MY OFFICE, YES.

* * *

"QUESTION: DID THE TWO OF YOU AT ALL TIMES AGREE ON THE COURSE OF ACTION [1279] THAT SHE WAS TAKING IN THE HARDWICK CASE?

"ANSWER: WELL, AT THAT TIME SHE WAS STILL INVESTIGATING INFORMATION. SHE HADN'T MADE A DETERMINATION OF WHAT SHE WAS GOING TO RECOMMEND OR ANY CHANGES IN THE REPORT, THE CASE PLAN, OR ANYTHING.

"QUESTION: BUT WHEN I SAY COURSE OF ACTION, I GUESS THE COURSE OF ACTION SHE

WAS UNDERTAKING WAS SHE WAS DOING FURTHER INVESTIGATION; RIGHT?

"ANSWER: CORRECT.

"QUESTION: AND SHE WAS PREPARING AND SUBMITTING TO THE JUVENILE COURT NUMEROUS COURT REPORT ADDENDUMS AND OTHER REPORTS, CORRECT?

"ANSWER: THAT'S CORRECT.

"QUESTION: AND THE TWO OF YOU AT ALL TIMES AGREED ON THAT COURSE OF ACTION?

"ANSWER: YES.

"QUESTION: AND THE TWO OF YOU AT ALL TIMES AGREED ON THE COURSE OF ACTION THAT SHE WAS TAKING IN GENERAL?

"ANSWER: YES.

[1280] "QUESTION: THE TWO OF YOU AGREED ON HOW THE CASE WOULD BE HANDLED?

"ANSWER: YES.

"QUESTION: EVERY STEP OF THE WAY?

"ANSWER: YES.

* * *

"QUESTION: LITERALLY, YOU CAN'T TELL THE JUDGE EVERY FACT IN EVERY CASE, CAN YOU?

"ANSWER: EVERY SIGNIFICANT FACT GOES INTO THAT COURT REPORT.

"QUESTION: SO WHO DECIDES WHAT'S SIGNIFICANT?

"ANSWER: THE SOCIAL WORKER AND I DECIDE IT.

"QUESTION: AND THE TWO OF YOU AGREED ON WHAT FACTS WERE SIGNIFICANT ENOUGH TO MAKE IT INTO THE REPORTS THAT WERE SUBMITTED TO THE JUVENILE COURT IN THIS CASE, CORRECT?

"ANSWER: THAT'S CORRECT.

[1281] "QUESTION: THE TWO OF YOU AGREED ON WHAT INFORMATION WOULD BE DISCLOSED TO THE JUVENILE COURT, CORRECT?

"ANSWER: YES.

"QUESTION: AND THE TWO OF YOU AGREED ON WHERE THE CHILDREN SHOULD BE KEPT AND FOR HOW LONG?

"ANSWER: WHERE THEY SHOULD BE KEPT WAS AGREED UPON.

"QUESTION: DID YOU HAVE A DISAGREEMENT ABOUT THE DURATION OF THAT DETENTION?

"ANSWER: NO. WE JUST DIDN'T KNOW FOR HOW LONG.

"QUESTION: BUT YOU BOTH AGREED TO CONTINUE TO DETAIN THE CHILDREN INDEFINITELY, FIRST AT ORANGEWOOD, AND THEN IN FOSTER CARE; CORRECT?

"ANSWER: YES.

* * *

[1287] "QUESTION: DURING THE COURSE OF MS. VREEKEN'S HANDLING OF THE HARDWICK MATTER, SHE CAME TO RELY UPON YOU TO BACK HER UP, DID SHE NOT?

"ANSWER: I'M HER SUPERVISOR. IT'S MY JOB TO DO THAT."

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
VS.	)	
COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, AND HELEN DWOJAK,	)	NO. 01CCO2379
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

MARCH 1, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:
LAW OFFICES OF SONDRA S. SUTHERLAND
BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:
BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[1476] (THE DEPOSITION TESTIMONY OF JOYCE REILY WAS READ INTO THE RECORD AS FOLLOWS:)

* * *

[1477] "QUESTION: AS OF FEBRUARY 17, 2000, YOU WERE DEPUTY COUNTY COUNSEL REPRESENTING THE SOCIAL SERVICES AGENCY IN THE JUVENILE COURT PROCEEDING RELATING TO KENDALL AND PRESLIE HARDWICK; CORRECT?

"ANSWER: YES.

* * *

[1478] "QUESTION: NOW, DURING YOUR HANDLING OF THE HARDWICK MATTER, DID YOU EVER BECOME AWARE OF ANY EVIDENCE THAT DEANNA HAD HERSELF SEXUALLY ABUSED EITHER OF HER CHILDREN?

"ANSWER: NO.

"QUESTION: DID YOU EVER DISCOVER ANY EVIDENCE DURING YOUR HANDLING OF THE HARDWICK MATTER THAT DEANNA HAD FAILED TO PROPERLY SUPERVISE EITHER OF HER CHILDREN?

"ANSWER: NO.

"QUESTION: OR THAT SHE HAD FAILED TO PROTECT EITHER OF HER CHILDREN?

"ANSWER: NO.

[1479] "QUESTION: OR THAT DEANNA PRESENTED A RISK OF SERIOUS PHYSICAL HARM TO THE CHILDREN?

"ANSWER: NO.

"QUESTION: ARE YOU AWARE OF ANYONE FROM YOUR OFFICE DISCLOSING TO THE JUVENILE COURT AT ANY TIME THAT THERE WAS NO EVIDENCE TO SUPPORT ANY PARTICULAR ALLEGATION IN THE PETITION IN THE HARDWICK CASE?

"ANSWER: NO.

"QUESTION: OR ANY AMENDMENT THERETO?

"ANSWER: NO.

"QUESTION: ARE YOU AWARE OF ANY OTHER EMPLOYEE OR REPRESENTATIVE OF THE SOCIAL SERVICES AGENCY EVER DISCLOSING TO THE JUVENILE COURT IN THE HARDWICK CASE THAT THERE WAS A LACK OF EVIDENCE TO SUPPORT ANY PARTICULAR ALLEGATION IN THE PETITION?

"ANSWER: NO.

"QUESTION: OR ANY AMENDMENT TO THAT PETITION?

"ANSWER: NO.

* * *

[1481] "QUESTION: YOU WERE PERSONALLY PRESENT AT THE JUVENILE COURT HEARING ON FEBRUARY 17, 2000, WERE YOU NOT?

"ANSWER: ACCORDING TO THIS TRANSCRIPT, YES.

"QUESTION: DO YOU RECALL SOCIAL WORKER MARCIE VREEKEN BEING PRESENT?

"ANSWER: YES.

"QUESTION: ALL RIGHT. I WOULD LIKE TO INVITE YOUR ATTENTION TO THE LANGUAGE AT THE BOTTOM OF THIS MINUTE ORDER WHICH STATES: 'COURT, COUNSEL, AND SOCIAL WORKER CONFERRED OFF RECORD.' DO YOU SEE THAT?

"ANSWER: YES.

* * *

[1482] "QUESTION: AND WOULD YOU AGREE THEN THAT THE OFF-RECORD CONVERSATION THAT IS DOCUMENTED IN THE MINUTE ORDER OCCURRED PRIOR TO THE COURT GOING ON THE RECORD ON FEBRUARY 17, 2000?

"ANSWER: YES.

"QUESTION: NOW, THE TRANSCRIPT, EXHIBIT 29, IS A RECORD OF THE ON-RECORD

HEARING BEFORE REFEREE BISCHOFF THAT DAY; CORRECT?

"ANSWER: YES.

"QUESTION: DID YOUR REVIEW OF THIS TRANSCRIPT HELP REFRESH YOUR MEMORY ABOUT WHAT THE SOCIAL WORKER TOLD REFEREE BISCHOFF DURING THE OFF-RECORD CONFERENCE ON FEBRUARY 17, 2000?

"ANSWER: ONLY TO THE EXTENT IT'S IN THE TRANSCRIPT.

"QUESTION: OKAY. TO WHAT EXTENT DID IT HELP REFRESH YOUR MEMORY?

"ANSWER: IF I REMEMBER, THAT WAS [1483] WHAT TRIGGERED REFEREE BISCHOFF MAKING THE ORDER THAT HE MADE.

"QUESTION: ARE YOU AWARE OF ANY EVIDENCE PRESENTED TO THE COURT THAT DAY THAT IT WAS IN ANY WAY NECESSARY TO REMOVE KENDALL FROM HER MOTHER'S CUSTODY, OTHER THAN THESE STATEMENTS BY THE SOCIAL WORKER?

"ANSWER: NO. I CAN'T RECALL ANYTHING.

* * *

"QUESTION: OKAY. LET'S MARK FOR IDENTIFICATION AS EXHIBIT 34 A MEMO THAT WAS INCLUDED IN THE JUVENILE COURT FILE.

"BY THIS MEMO, MS. VREEKEN, THE SOCIAL WORKER, THE SENIOR SOCIAL WORKER ON THIS CASE, WAS ASKING YOU TO AMEND [1484] THE PETITION AGAIN; CORRECT?

"ANSWER: YES.

"QUESTION: AND THAT WOULD HAVE BEEN TO PREPARE THE SECOND – WHAT WOULD BE THE SECOND AMENDED PETITION, CORRECT?

"ANSWER: YES.

"QUESTION: AND IT WAS MS. VREEKEN WHO PROVIDED THIS INFORMATION TO YOU ABOUT WHAT ALLEGEDLY OCCURRED ON FEBRUARY 15, 2000; CORRECT?

"ANSWER: YES.

* * *

"QUESTION: AND IT WAS MS. VREEKEN WHO CONVEYED TO YOU THAT DEANNA TOLD HER CHILDREN THAT THEIR FATHER WAS TRYING TO TAKE THEM AWAY FROM HER AND PUT THEM IN A FOSTER HOME, CORRECT?

"ANSWER: THAT'S WHAT – YES.

"QUESTION: AND IT WAS BECAUSE THAT INFORMATION WAS CONVEYED TO YOU BY [1485] MARCIE VREEKEN THAT YOU IN FACT INCLUDED THAT ALLEGATION IN THE SECOND AMENDED PETITION, CORRECT?

"ANSWER: YES.

* * *

"QUESTION: SHE WAS ASKING YOU TO ALLEGE THAT THERE WAS A SUBSTANTIAL DANGER TO THE PSYCHOLOGICAL AND EMOTIONAL HEALTH OF THE CHILDREN DUE TO THEIR MOTHER'S NEGATIVE STATEMENTS ABOUT THE CHILDREN'S FATHER; IS THAT RIGHT?

"ANSWER: YES.

* * *

[1487] "QUESTION: YOU, IN FACT, AMENDED THE PETITION AS MS. VREEKEN REQUESTED; RIGHT?

"ANSWER: YES.

"QUESTION: AND YOU INCLUDED THE ALLEGATIONS SHE REQUESTED IN THAT SECOND AMENDED PETITION, CORRECT?

"ANSWER: YES.

"QUESTION: EXHIBIT 30 IS THE SECOND AMENDED PETITION THAT YOU FILED AT MS. VREEKEN'S REQUEST, IS IT NOT?

"ANSWER: YES.

"QUESTION: AND YOU CAUSED THIS SECOND AMENDED PETITION TO BE FILED WITH THE JUVENILE COURT ON FEBRUARY 23, 2000?

"ANSWER: YES.

"QUESTION: DID YOU INTEND FOR [1488] THE JUVENILE COURT TO BELIEVE THE CONTENTS OF THIS DOCUMENT?

"ANSWER: YES.

"QUESTION: AND YOU INTENDED THE JUVENILE COURT TO RELY ON THE CONTENTS OF THIS DOCUMENT IN MAKING HIS DECISIONS IN THIS CASE?

"ANSWER: YES.

"QUESTION: AND YOU ADDED PRESLIE TO THIS AMENDMENT, DID YOU NOT?

"ANSWER: YES.

"QUESTION: NOW, A PERIOD OF SIX DAYS HAD ELAPSED BETWEEN FEBRUARY 17TH WHEN PRESLIE WAS REMOVED FROM HER MOTHER'S CUSTODY AND THE FEBRUARY 23RD FILING OF THIS AMENDED PETITION; CORRECT?

"ANSWER: YES.

* * *

[1490] MR. MCMILLAN: I HAVE PLENTY OF READINGS, OR WE CAN READ THE RESPONSES TO THE REQUEST FOR ADMISSIONS. AND IF WE DO THAT, I WOULD REQUEST A PREINSTRUCTION TO THE JURY AS TO WHAT ADMISSIONS ARE.

THE COURT: WHY DON'T WE DO THAT.

I CAN TELL THE LADIES AND GENTLEMEN OF THE JURY THAT THERE IS ANOTHER VERSION OF PRETRIAL PREPARATION. WE'VE ALREADY LEARNED ABOUT A DEPOSITION, AND YOU'VE HAD SEVERAL EXAMPLES OF THE READINGS FROM A DEPOSITION.

[1491] THERE IS ALSO A PRETRIAL PROCEDURE THROUGH WHICH ONE SIDE CAN ASK THE OTHER TO ADMIT THE TRUTH OF A STATEMENT OF FACT OR TO ADMIT THE GENUINENESS OF A DOCUMENT.

I THINK IN THIS INSTANCE WE'RE GOING TO HAVE CIRCUMSTANCES REPORTED TO YOU IN WHICH CERTAIN STATEMENTS OF FACT WERE TENDERED BY THE PLAINTIFF TO THE DEFENDANT, AND THE DEFENDANT IN RESPONSE THERETO SAID I ADMIT THAT IS TRUE. WHEN THAT BE THE CASE AND YOU HEAR THAT INFORMATION, THEN OF COURSE YOU TAKE THAT AS BEING A FACT IN THIS CASE.

SO MS. SUTHERLAND WILL READ YOU THE STATEMENT THAT WAS TENDERED; AND IN EACH INSTANCE I BELIEVE THE RESPONSE WAS YES, THAT IS TRUE.

MS. SUTHERLAND:

* * *

THESE ARE PLAINTIFF'S REQUEST FOR ADMISSIONS TO DEFENDANT HELEN DWOJAK.

REQUEST FOR ADMISSION NUMBER ONE: ADMIT THAT YOU APPROVED THE FEBRUARY 17, 2000, COURT REPORT ADDENDUM PREPARED BY DEFENDANT MARCIE VREEKEN IN THE MATTER OF HARDWICK, KENDALL AND PRESLIE, MINORS, ORANGE COUNTY SUPERIOR COURT, CASE NUMBER DP-002001 AND DP-002002.

THE RESPONSE: ADMIT.

* * *

[1492] REQUEST NUMBER TWO: ADMIT THAT YOU APPROVED THE FEBRUARY 23RD, 2000, DETENTION HEARING REPORT PREPARED BY DEFENDANT MARCIE VREEKEN IN THE SAME MATTER.

REQUEST NUMBER THREE – AND THAT WAS AN ADMIT. ADMIT THAT YOU APPROVED THE MARCH 1 COURT REPORT ADDENDUM PREPARED BY MARCIE VREEKEN IN THE SAME MATTER.

ADMIT.

REQUEST NUMBER ADMISSION NUMBER FOUR: ADMIT THAT YOU APPROVED THE

MARCH 14, 2000, COURT REPORT ADDENDUM PREPARED BY MARCIE VREEKEN IN THE SAME MATTER.

ADMIT.

REQUEST NUMBER FIVE: ADMIT THAT YOU APPROVED THE MARCH 29, 2000, COURT REPORT ADDENDUM PREPARED BY MARCIE VREEKEN IN THE SAME MATTER.

ADMIT.

REQUEST NUMBER SIX: ADMIT THAT YOU APPROVED THE APRIL 4, 2000, COURT REPORT ADDENDUM PREPARED BY DEFENDANT MARCIE VREEKEN IN THE SAME MATTER.

ADMIT.

REQUEST NUMBER SEVEN: ADMIT THAT YOU APPROVED THE APRIL 17, 2000, COURT REPORT ADDENDUM PREPARED BY [1493] MARCIE VREEKEN IN THE SAME MATTER.

ADMIT.

ADMIT THAT YOU APPROVED THE –

NUMBER EIGHT: ADMIT THAT YOU APPROVED THE MAY 19, 2000, COURT REPORT ADDENDUM PREPARED BY MARCIE VREEKEN IN THE SAME MATTER.

ADMIT.

REQUEST NUMBER NINE: ADMIT THAT YOU APPROVED THE MAY 19, 2000, AGREEMENT, 301 AGREEMENT, IN THE SAME MATTER.

ADMIT.

REQUEST NUMBER 15: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE POLICIES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES AGENCY IN YOUR HANDLING OF THE MATTER OF HARDWICK, KENDALL AND PRESLIE, MINORS, SAME CASE NUMBERS.

ADMIT.

NUMBER 16: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE CUSTOMS, MEANING THE PERMANENT, WIDESPREAD, OR WELL SETTLED PRACTICES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES AGENCY IN YOUR HANDLING OF THE SAME MATTER.

ADMIT.

REQUEST NUMBER 17: ADMIT THAT YOU DID NOT MAKE THE DECISION TO INSTITUTE THE DEPENDENCY PROCEEDINGS IN THAT MATTER.

[1494] RESPONSE: ADMIT.

REQUEST NUMBER 19: ADMIT THAT YOU WERE AT ALL TIMES ACTING IN THE PERFORMANCE OF YOUR OFFICIAL DUTIES IN YOUR HANDLING OF THE HARDWICK MATTER.

ADMIT.

REQUEST NUMBER 23: ADMIT THAT YOU APPROVED THE DECISIONS AND ACTS OF DEFENDANTS MARCIE VREEKEN AND ELAINE WILKINS.

ADMIT.

REQUEST NUMBER 28: ADMIT THAT YOU NEVER DISCLOSED KNOWN FALSE STATEMENTS BY OTHER SOCIAL WORKERS TO THE JUVENILE COURT IN THE HARDWICK MATTER.

RESPONSE: ADMIT.

REQUEST NUMBER 31: ADMIT THAT PLAINTIFF, DEANNA R. FOGARTY-HARDWICK, AT NO TIME PRESENTED A RISK OF SERIOUS PHYSICAL HARM TO THE CHILDREN IN THE HARDWICK MATTER.

RESPONSE: ADMIT.

* * *

[1495] TURNING NOW TO EXHIBIT 237, PLAINTIFF'S REQUEST FOR ADMISSIONS TO DEFENDANT MARCIE VREEKEN.

REQUEST NUMBER 13: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE POLICIES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES AGENCY IN YOUR HANDLING OF THE HARDWICK MATTER.

RESPONSE: ADMIT.

NUMBER 14: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE CUSTOMS, MEANING THE PERMANENT, WIDESPREAD, OR WELL SETTLED PRACTICES OF DEFENDANTS ORANGE COUNTY SOCIAL SERVICES AGENCY IN YOUR HANDLING OF THE HARDWICK MATTER.

[1496] RESPONSE: ADMIT.

REQUEST NUMBER 15: ADMIT THAT YOU DID NOT MAKE THE DECISION TO INSTITUTE THE DEPENDENCY PROCEEDINGS IN THE HARDWICK MATTER.

RESPONSE: ADMIT.

REQUEST NUMBER 17: ADMIT THAT YOU WERE AT ALL TIMES ACTING IN THE PERFORMANCE OF YOUR OFFICIAL DUTIES IN HANDLING THE HARDWICK MATTER.

RESPONSE: ADMIT.

FINALLY, TURNING TO EXHIBIT 239, PLAINTIFF'S REQUEST FOR ADMISSIONS DIRECTED TO THE ORANGE COUNTY SOCIAL SERVICES AGENCY ITSELF.

REQUEST NUMBER EIGHT: ADMIT THAT YOU CONTINUED TO DETAIN THE CHILDREN IN THE HARDWICK MATTER UNTIL ON OR ABOUT MAY 19, 2000.

ADMIT.

REQUEST NUMBER 16: ADMIT THAT, AS OF FEBRUARY 17, 2000, IT WAS YOUR POLICY TO INTERVIEW CHILDREN WITHOUT ALLOWING A PARENT TO BE PRESENT.

RESPONSE: ADMIT.

ADMIT THAT AS OF FEBRUARY 17, 2000, IT WAS YOUR CUSTOM, MEANING A PERMANENT, WIDESPREAD, OR WELL SETTLED PRACTICE, TO INTERVIEW CHILDREN WITHOUT ALLOWING A PARENT TO BE PRESENT.

RESPONSE: ADMIT.

REQUEST NUMBER 18: ADMIT THAT THE CHILDREN IN [1497] THE HARDWICK MATTER WERE INTERVIEWED ON NUMEROUS OCCASIONS WITHOUT ALLOWING A PARENT TO BE PRESENT.

RESPONSE: ADMIT.

REQUEST NUMBER 31: ADMIT THAT DEFENDANT MARCIE VREEKEN WAS AT ALL TIMES CARRYING OUT THE POLICIES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES AGENCY IN HER HANDLING OF THE HARDWICK MATTER.

RESPONSE: ADMIT.

REQUEST NUMBER 32 IS THE SAME REQUEST AS TO DEFENDANT ELAINE WILKINS, AND REQUEST NUMBER 34 IS THE SAME AS TO HELEN DWOJAK.

AND THAT CONCLUDES MY READING OF THAT.

MR. STEBENS: I'LL OBJECT THAT THE LATTER OF THOSE READINGS REFLECTS THAT AN INAPPROPRIATE ENTITY. THE RESPONSE WAS MADE BY THE COUNTY OF ORANGE. THE SOCIAL SERVICES AGENCY IS A SPECIFIC DIVISION OF THAT.

THE COURT: THE OBJECTION IS OVERRULED.

* * *

[1498] PETER HERMES,

CALLED AS A WITNESS BY AND ON BEHALF OF THE PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

* * *

Q JUST BRIEFLY, CAN YOU DESCRIBE FOR US JUST A LITTLE SUMMATION OF YOUR BACKGROUND?

A I'M A LAWYER. I'VE BEEN A LAWYER SINCE 1974, [1499] APPROXIMATELY 33 YEARS. AND I HAVE SPECIALIZED ALMOST EXCLUSIVELY IN THOSE 33 YEARS AS A FAMILY LAW LAWYER.

* * *

Q IN THOSE 33 YEARS OF PRACTICE, DID YOU EVER HAVE OCCASION TO OPERATE IN DEPENDENCY COURT?

A YES.

* * *

[1500] Q AND ONE OF THOSE CASES WAS THE CASE WITH MS. DEANNA FOGARTY, RIGHT?

A CORRECT.

Q AND AT WHAT POINT DID YOU COME INTO THE CASE TO REPRESENT – OR TO ASSIST IN THE REPRESENTATION OR REPRESENT MS. FOGARTY?

A IT WAS ON OR ABOUT FEBRUARY 20TH, I BELIEVE, OF THE YEAR 2000. IT WAS IMMEDIATELY AFTER THE DETENTION HEARING, I BELIEVE IT WAS, OF FEBRUARY 17TH.

Q THE ONE WHERE HER CHILDREN HAD BEEN TAKEN AWAY?

A THAT'S CORRECT. REMOVED.

Q AND IN WHAT CAPACITY WERE YOU BROUGHT INTO THE CASE?

A I WAS BROUGHT IN TO HANDLE THE TRIAL AND LITIGATION OF THE ENTIRE MATTER IN THE DEPENDENCY COURT AND THEN PICK UP THE WHATEVER REMAINED AFTERWARDS IN THE FAMILY LAW COURT, SINCE WE

ANTICIPATED THAT AFTER THE DEPENDENCY ACTION WOULD BE COMPLETED THAT IT WOULD GO INTO FAMILY LAW AND I WOULD CONTINUE ON WITH THE CUSTODY ASPECTS AND THE REST OF THE CASE AS WELL.

* * *

[1501] Q DURING THAT TIME PERIOD FROM FEBRUARY 20TH UNTIL LATE APRIL OR MAY OF 2000, DID YOU FREQUENTLY APPEAR AT COURT HEARINGS?

A I APPEARED AT EVERY COURT HEARING.

Q EVERY COURT HEARING?

A YES. THERE WERE APPROXIMATELY, I WANT TO SAY – I THINK THERE WAS ABOUT 20 ACTUAL TRIAL DAYS AND COURT HEARINGS WHERE I PARTICIPATED, GIVE OR TAKE A FEW.

[1502] Q OKAY.

A VERY EXTENSIVE.

Q AND DURING THOSE COURT HEARINGS, THE TIMES THAT YOU WERE SPENDING THE DAY IN COURT, DID YOU HAVE OCCASION TO MEET ANY OF THE DEFENDANTS IN THIS CASE?

A YOU'RE POINTING TO DEFENDANTS.

ARE YOU TALKING ABOUT MS. WILKINS AND MS. VREEKEN?

Q YES.

A EVERY DAY THAT THEY WERE THERE, WE WOULD HAVE SOME INTERACTION. MORE INTERACTION EARLIER ON, LESS IN THE MIDDLE, AND MANY MORE TOWARDS THE END.

* * *

[1514] Q NOW, HOW DID YOU FIND OUT ABOUT THE EXISTENCE OF THIS LETTER?

A I CALLED DR. MITCHELL AND SHE TOLD ME SHE HAD SENT IT.

Q OKAY.

A SHE HAD SAID SHE SENT IT THAT MORNING TO SOCIAL SERVICES.

Q AND WHEN YOU CALLED HER, DID SHE TELL YOU WHAT THE SUBSTANCE OF THE LETTER WAS?

* * *

THE WITNESS: SHE DESCRIBED IN DETAIL HOW THE CHILDREN WERE EMOTIONALLY, HOW THEY WERE BREAKING DOWN, HOW THEY WERE NOT HANDLING PLACEMENT. AND THERE WAS A RECOMMENDATION THAT THEY DO SOMETHING ABOUT GETTING BACK INTO THERAPY WITH HER AND REMOVE THEM FROM PLACEMENT, WAS [1515] BASICALLY HER SUGGESTION.

* * *

THE WITNESS: IT BASICALLY WASN'T WORKING.

BY MR. MCMILLAN:

Q CORRECT ME IF I'M WRONG, BUT YOU WERE IN THE MIDST OF TRIAL WHEN THIS WAS HAPPENING; RIGHT?

A YES.

Q WOULD THAT LETTER HAVE BEEN -- OR THAT INFORMATION CONVEYED IN THAT LETTER – WOULD THAT HAVE BEEN SOMETHING THAT WAS MATERIAL TO WHAT WAS GOING ON IN THE CASE AT THAT TIME?

A YES.

Q WOULD THAT HAVE BEEN SOMETHING THAT YOU WOULD HAVE CONSIDERED TO BE EXCULPATORY EVIDENCE?

A YES.

* * *

THE ISSUE BEFORE THE COURT WAS THE BASIS FOR PLACEMENT, WHETHER THEY SHOULD BE PULLED OUT OF PLACEMENT OR RETURNED TO MOTHER, AND THE PSYCHOLOGICAL MAKEUP OF THE CHILDREN.

AND WHAT WAS IMPACTING THEM THROUGH PLACEMENT WAS EXTREMELY IMPORTANT, BECAUSE SOCIAL SERVICES HAD THE [1516] ABILITY AT ANY TIME TO RECOMMEND TO THE

COURT TO REMOVE THESE CHILDREN AND IT DIDN'T HAPPEN. AND THEY HELD BACK THIS INFORMATION THAT THEY HAD THAT SHOULD HAVE BEEN EITHER PRODUCED IN LETTER FORM, OR AT LEAST IN A REPORT FORM, OR AN ORAL MOTION TO THE COURT INDICATING WE HAVE A PROBLEM, THIS IS WHAT WE NEED TO DO. AND THEY NEVER DID THAT.

Q BESIDES THIS LETTER, THIS MARJORIE MITCHELL LETTER, IS THERE ANY OTHER EXCULPATORY INFORMATION THAT YOU KNOW OF THAT WAS WITHHELD?

A YES.

Q OKAY. WHY DON'T YOU GO AHEAD AND EXPLAIN IT FOR ME.

A IT'S MORE THAN ONE, SO I'LL TAKE THE FIRST ONE FIRST.

Q OKAY.

A AT THE FEBRUARY 17TH HEARING, AND AFTERWARDS, THROUGH TRIAL, THERE WAS TWO THINGS THAT WAS NOT PRESENTED BY THE – AT LEAST TWO THINGS NOT PRESENTED BY THE SOCIAL SERVICES.

* * *

[1517] Q SO IN THE COURSE OF PREPARING FOR TRIAL OR THE [1518] HEARING, YOU REVIEWED A LOT OF DATA, YOU SPOKE WITH

MS. VREEKEN AND MS. WILKINS AND MS. DWOJAK.

AND IN THE COURSE OF ALL OF THAT PREPARATION, THOSE CONVERSATIONS, WERE YOU ABLE TO DISCOVER THAT THERE WERE MATERIAL ITEMS OF EVIDENCE THAT HAD NOT BEEN PRESENTED TO THE COURT THAT WOULD HAVE BEEN EXCULPATORY IN NATURE?

A YES.

Q OKAY. GO AHEAD AND GIVE ME THAT.

* * *

A * * * GOING BACK TO YOUR QUESTION, I REMEMBER INTERVIEWING AND DISCUSSING WITH MS. VREEKEN A SITUATION CONCERNING MR. DELGADIO. HE WAS THE COURT-APPOINTED MONITOR. AND MY CLIENT WAS TO FOLLOW CERTAIN RULES FOR VISITATION TO FACILITATE THE CHILDREN GOING TO THEIR FATHER UNDER MONITORED CIRCUMSTANCES. THIS IS BEFORE THE 17TH. AND IN THE INTERVIEW, I WAS TOLD BY MS. VREEKEN [1519] WHAT HAD HAPPENED.

AND WHAT HAD HAPPENED WAS THAT MY CLIENT, SHE ADMITTED – AND SHE ADMITTED IN HER TESTIMONY LATER ON – THAT SHE FOLLOWED THE RULES. SHE TOOK THE CHILDREN TO THE MONITOR.

THE RULES WERE YOU DELIVER THEM TO THE MONITOR. THE MONITOR THEN TAKES OVER AND DEALS WITH THE CHILDREN AND FATHER, BECAUSE AT THAT TIME THE CHILDREN DID NOT WANT TO SEE THEIR FATHER BECAUSE OF WHAT WAS GOING ON. THEN SHE WOULD LEAVE.

WELL, ON THIS VISITATION ON THE 13TH, JUST BEFORE THIS – THE 15TH MEETING AND THEN THE 17TH HEARING, MY CLIENT TOOK THE CHILDREN TO MR. DELGADIO. THE CHILDREN WERE GIVEN TO HIM. SHE LEFT, JUST FOLLOWING THE RULES.

AND SHE SAID SHE FOLLOWED THE RULES, THERE WAS NO PROBLEMS, THERE WAS NO ALIENATION BY MY CLIENT.

Q MS. VREEKEN SAID THAT?

A YES.

AND THEN THERE WAS DISCUSSION ABOUT HOW THE CHILDREN CLAIMED THAT MR. DELGADIO IS NOT PROTECTING THEM BECAUSE THE FATHER WHISPERED IN ONE OF THE KIDS' EARS – I THINK IT WAS KENDALL'S – MADE A THREAT TO HER. SHE COMPLAINED TO THE MONITOR AND THE MONITOR SORT OF SAID, "WELL, I DIDN'T HEAR IT."

Q WHEN YOU SAID SHE COMPLAINED –

[1520] A THE DAUGHTER.

Q – WAS IT KENDALL THAT COMPLAINED TO THE MONITOR, OR WHO COMPLAINED TO THE MONITOR?

A KENDALL COMPLAINED TO THE MONITOR, THEN IT GOT BACK TO MS. VREEKEN. AND I'M NOT SURE HOW IT GOT BACK TO MS. VREEKEN.

* * *

[1522] Q LET'S MOVE ON TO THE SECOND INSTANCE WHERE EXCULPATORY EVIDENCE WAS WITHHELD.

* * *

[1524] Q DID THEY GIVE YOU THE RECORDS YOU WERE LOOKING FOR?

A SOME OF THE RECORDS WE GOT; SOME WE DID NOT. AND THE CRITICAL ONE I DID NOT GET.

Q WHAT WAS THE CRITICAL ONE?

A THE CRITICAL RECORD THAT I DID NOT GET WAS A MEMO OR INCIDENT REPORT THAT WAS SUPPOSED TO BE DRAFTED AND SUBMITTED BY MS. WILKINS, THE PERSON WHO ALLEGEDLY HEARD MY CLIENT MAKE CERTAIN STATEMENTS.

DURING THE COURSE OF THE TRIAL, THEY REFUSED TO [1525] GIVE US THAT INFORMATION. AND AT ONE POINT THEY CLAIMED

THAT THERE WAS NO SUCH MEMO; MS. WILKINS HADN'T PREPARED IT.

* * *

Q DID YOU EVER FIND THAT MEMO?

A NO. I NEVER RECEIVED A COPY OF THE MEMO.

* * *

[1528] Q WHAT WAS IT DOING TO MOM?

A IT WAS – IT – IT EMOTIONALLY DEVASTATED HER. SHE WENT FROM THIS VERY BEAUTIFUL, VIBRANT, GOOD-HUMORED WOMAN DURING THE COURSE OF THIS TRIAL, WITHIN LIKE TWO OR THREE MONTHS, TO JUST ALMOST SHE COULDN'T TALK AT THE END. SHE – I MEAN, SHE COULDN'T FOCUS ON ANYTHING. SHE BECAME DEPRESSED. WE HAD A HARD TIME TO DEAL WITH HER EMOTIONALLY.

WE HAVE TO PREPARE A CASE. WE NEED A CLIENT. SHE WAS BREAKING DOWN. I MEAN, SHE HAD TO GO SEE A THERAPIST. SHE COULDN'T EVEN BEAR SEEING HER CHILDREN WHEN SHE WOULD VISIT ON THESE MONITORED TIMES BECAUSE OF WHAT SHE SAW THAT WAS HAPPENING TO THESE KIDS.

Q WAS THAT ONE OF THE MOTIVATIONS THAT FACTORED INTO THE DECISION TO TRY

TO GET SOME SORT OF SPEEDY RESOLUTION OR SETTLEMENT?

A YES. THAT WAS ONE.

* * *

[1532] Q OKAY. AT SOME POINT DID YOU ACTUALLY SEND OR NOTIFY OR COMPLAIN TO ANYBODY AT SOCIAL SERVICES ABOUT WHAT YOU PERCEIVED GOING ON IN THIS PARTICULAR CASE?

A YES.

Q HOW DID YOU GO ABOUT VOICING THAT COMPLAINT?

A WELL, I DID IT VERBALLY TO MS. VREEKEN, MS. DWOJAK ON NUMEROUS OCCASIONS, TO TRY TO RECTIFY THE WRONG THAT WAS – RESULTED FROM WHAT THEY DID OR DIDN'T DO.

Q DID YOU EVER GO UP THE CHAIN?

A YES, I DID. THEN I WROTE A LETTER TO, I BELIEVE – I'M NOT SURE HOW HIGH I WENT, BUT SOMEWHERE MUCH HIGHER THAN MS. DWOJAK, IN THE DEPARTMENT OF CHILDREN'S SERVICES FOR THE COUNTY, AND BASICALLY GAVE [1533] THEM A LETTER SUMMARIZING WHAT I BELIEVED TOOK PLACE IN AN ATTEMPT TO TRY TO AGAIN RESOLVE THIS WITHOUT GOING ANY FURTHER TO GET THIS CASE OUT OF DEPENDENCY AND GET THIS

CASE – KIDS BACK TO THEIR MOTHER AND MOVE TO THE FAMILY LAW COURT.

Q AND DO YOU REMEMBER WHO YOU SENT IT TO?

A I HAVE A COPY OF IT. I DON'T REMEMBER RIGHT NOW. I CAN READ IT.

Q IF YOU WERE TO LOOK AT THE COPY, WOULD THAT REFRESH YOUR RECOLLECTION AS TO WHO YOU SENT IT TO?

A I SENT THE LETTER TO JOYCE REILY. SHE WAS A DEPUTY ORANGE COUNTY COUNSEL. AND THEN I SENT A COPY OF THIS LETTER CC'D TO MY CLIENT; RITA SAENZ, THE DIRECTOR OF CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; LARRY LEAMAN, THE DIRECTOR OF ORANGE COUNTY SOCIAL SERVICES AGENCY; MIKE MCMICHAEL, THE PROGRAM MANAGER; HELEN DWOJAK, THE SOCIAL SERVICES SUPERVISOR; AND MS. VREEKEN.

Q HAVE YOU EVER MET LARRY LEAMAN?

A I DON'T BELIEVE I HAVE. I DON'T RECALL.

Q BUT YOU CC'D A COPY OF THIS LETTER TO HIM, RIGHT?

A YES.

Q AND IT SAYS HERE THAT HE IS THE DIRECTOR OF ORANGE COUNTY SOCIAL SERVICES AGENCY.

DO YOU HAVE ANY UNDERSTANDING AS TO WHAT THE DIRECTOR OF THE AGENCY DOES?

[1534] A JUST A GENERAL UNDERSTANDING. HE OVERSEES ALL OPERATIONS OF THE AGENCY.

Q WHY WAS IT YOU SENT HIM THIS LETTER?

A WELL, BECAUSE WE WERE GETTING – TOWARDS THE END, WE WERE GETTING A CHANGE OF POSITION FROM THE DEPARTMENT OF SOCIAL SERVICES. YOU KNOW, ONE DAY THEY WANT TO SETTLE AND MOM IS OKAY, AND THEN THEY SHIFTED TO A DIRECTOR – OR A SUPERVISOR, MS. DWOJAK.

SO I FELT THAT I'M GOING TO HAVE TO GO ABOVE HER AND SEND IT TO THIS PERSON SO HOPEFULLY HE WILL MAYBE DO AN INTERNAL INVESTIGATION AND WE CAN COME TO SOME RESOLUTION.

Q OKAY. HOW ABOUT MIKE MCMICHAEL, PROGRAM MANAGER? DO YOU HAVE ANY UNDERSTANDING AS TO WHO HE WAS AT THE TIME, WHAT HE WAS SUPPOSED TO DO?

A AS I SIT HERE TODAY, I DON'T RECALL WHAT HIS SPECIFICS WERE. I JUST WENT

THROUGH THE PECKING ORDER OF THE PEOPLE THAT I THOUGHT SHOULD HAVE THIS INFORMATION SO THAT THIS LETTER DIDN'T SLIP THROUGH THE CRACKS AND IT WAS ON SOME DIRECTOR'S DESK AND NOT BE FILTERED DOWN TO THE RIGHT PEOPLE TO HANDLE THIS.

Q SO YOU JUST SORT OF SHOT-GUNNED IT OUT TO EVERYBODY IMAGINABLE?

A YES, WHO HAD SOME AUTHORITY TO DEAL WITH IT. YES.

* * *

[1535] Q DID YOU EVER GET ANY RESPONSE FROM ANYBODY AT SOCIAL SERVICES ABOUT WHAT WAS GOING ON HERE, WHAT YOU WERE COMPLAINING ABOUT?

A NO. NEVER DID.

Q DID AN INVESTIGATOR EVER CALL YOU UP AND TRY TO GET MORE DETAILS?

A NO.

[1536] Q NOBODY EVER SENT YOU A LETTER SAYING WE'RE INVESTIGATING THE MATTER, WE TAKE IT SERIOUSLY?

A NO.

Q AND I'M SORRY. DID YOU BRING IT WITH YOU HERE TODAY, TO COURT?

A YES, I DID.

* * *

THE NEXT QUESTION I'M GOING TO ASK YOU IS WHETHER THE LETTER THAT YOU HAVE THERE IN YOUR HAND IS A TRUE AND ACCURATE REFLECTION OF THE LETTER THAT YOU SENT TO COUNTY COUNSEL, RITA SAENZ, LARRY LEAMAN, MIKE MCMICHAEL, HELEN DWOJAK, AND MARCIE VREEKEN ON APRIL 14TH, 2000.

A YES, IT IS.

* * *

[1559] Q BY VIRTUE OF THIS MINUTE ORDER, WAS THE PETITION IN THE DEPENDENCY CASE DISMISSED?

A IT SAYS THAT THE SECOND AMENDED PETITION DATED FEBRUARY 23, AS TO COUNTS 12 AND 3, DISMISSED ON MOTION OF PETITIONER WITHOUT PREJUDICE, PURSUANT TO 301 AND FORMAL SUPERVISION.

* * *

[1610] (THE DEPOSITION TESTIMONY OF PATRICIA ANN DUMAS WAS READ INTO THE RECORD AS FOLLOWS:)

* * *

[1612] "QUESTION: WHAT IS YOUR CURRENT JOB TITLE?

"ANSWER: SENIOR SOCIAL WORKER.

"QUESTION: FOR HOW LONG HAVE YOU HELD THAT JOB TITLE?

"ANSWER: NINE YEARS.

* * *

[1616] "QUESTION: AND I TAKE IT NO ONE THEN ATTEMPTED TO INVESTIGATE DEANNA'S ALLEGATION THAT MS. VREEKEN HAD LIED TO THE JUVENILE COURT, THAT YOU ARE AWARE OF?

[1617] "ANSWER: NO, NOT THAT I'M AWARE OF.

* * *

[1618] "QUESTION: THE NEXT DAY, MARCH 2ND, 2000, DID YOU ACCOMPANY MS. VREEKEN TO ORANGEWOOD CHILDREN'S HOME FOR AN INTERVIEW WITH THE CHILDREN?

"ANSWER: I DON'T REMEMBER THE DATE; BUT, YES, I DID ACCOMPANY MS. VREEKEN TO ORANGEWOOD TO INTERVIEW THE TWO CHILDREN. YES.

* * *

[1619] "ANSWER: WHAT I REMEMBER IS MARCIE ASKING THEM QUESTIONS I BELIEVE ABOUT THE ALLEGATIONS ALL OVER AGAIN. AND I THINK I ALSO REMEMBER HER ASKING THEM SPECIFICALLY ABOUT SOME INCIDENT

WITH DAD WHISPERING OR SOMETHING HAPPENING IN A MONITORED VISIT.

"QUESTION: AND THAT'S WHAT OCCURRED AT ORANGEWOOD?

"ANSWER: YES.

"QUESTION: AND YOU WERE PRESENT DURING THIS INTERVIEW?

"ANSWER: YES.

"QUESTION: WAS A PARENT PRESENT?

"ANSWER: NO.

"QUESTION: WAS EITHER PARENT GIVEN AN OPTION TO BE PRESENT?

"ANSWER: I DON'T THINK SO.

* * *

[1624] (THE DEPOSITION OF LAWRENCE LEAMAN WAS READ INTO THE RECORD AS FOLLOWS:)

* * *

"QUESTION: SO YOU SERVED AS THE DIRECTOR OF THE ORANGE COUNTY SOCIAL SERVICE AGENCY FOR 20 YEARS?

[1625] "ANSWER: YES.

* * *

"QUESTION: SO YOU WERE THE PERSON WHO IS MOST RESPONSIBLE FOR ADMINISTERING, FOR EXAMPLE, THE CHILD WELFARE SERVICE PROGRAM; CORRECT?

"ANSWER: IN ORANGE COUNTY.

"QUESTION: IS THAT CORRECT?

"ANSWER: YES.

"QUESTION: AND YOU WERE THE PERSON WHO AT THE ORANGE COUNTY SOCIAL SERVICE AGENCY WAS RESPONSIBLE FOR [1626] MAKING SURE THAT THE POLICIES CONTAINED WITHIN THE RELEVANT PORTION OF THE WELFARE & INSTITUTIONS CODE AND OTHER LAWS APPLICABLE TO CHILD WELFARE SERVICES WERE IMPLEMENTED AND CARRIED OUT IN THE COUNTY?

"ANSWER: TO THE EXTENT I HAD JURISDICTION, YES.

"QUESTION: AND YOU WERE IN FACT THE DIRECTOR OF THE SOCIAL SERVICE AGENCY AS OF FEBRUARY 17, 2000; CORRECT?

"ANSWER: YES.

* * *

[1627] "QUESTION: WHAT RESPONSIBILITY DID YOU HAVE AS OF FEBRUARY 2000 TO ASSURE THAT ADEQUATE TRAINING WAS PROVIDED TO SOCIAL WORKERS IN THE CHILD

WELFARE SERVICES DIVISION OF THE SOCIAL SERVICE AGENCY?

"ANSWER: OVERSIGHT RESPONSIBILITY.

* * *

[1628] "QUESTION: DID YOU EVER BACK IN 2000 OR THEREABOUTS CONSIDER THE ISSUE OF A PARENT'S RIGHTS IN ONE OF THESE PROCEEDINGS TO BE A HOT BUTTON ISSUE, AS YOU'VE DEFINED THE TERM?

"ANSWER: YES, AT TIMES.

* * *

[1630] "QUESTION: WELL, AT THE TIME THAT YOU WERE THE DIRECTOR, WAS IT YOUR POLICY TO DISCLOSE TO THE OPPOSING PARTY, THE PARENT, EXCULPATORY EVIDENCE THAT YOUR DEPARTMENT OBTAINED DURING ITS INVESTIGATIONS.

"ANSWER: I AM, AS YOU MAY KNOW, NOT AN ATTORNEY. AND I'M NOT EVEN SURE WHAT THE DEFINITION OF EXCULPATORY EVIDENCE IS.

"QUESTION: LET ME ASK IT THIS WAY: IN THE EVENT THAT ONE OF YOUR SOCIAL WORKERS DISCOVERED SOME FACT THAT WOULD DEMONSTRATE THE INCORRECTNESS OF THE ALLEGATIONS, WOULD THAT BE SOMETHING THAT YOU WOULD HAVE A POLICY

WHICH WOULD MANDATE THE DISCLOSURE OF THAT FACT?

"ANSWER: I'M NOT AWARE OF A POLICY, PER SE, BUT IT WOULD BE MY EXPECTATION. IT WE'RE TALKING ABOUT A PRESENTATION TO THE COURT, THAT ALL [1631] DYNAMICS OF THE CASE BE PRESENTED, INCLUDING ANY INFORMATION THAT YOU DESCRIBED, SUCH AS YOU DESCRIBED.

* * *

"QUESTION: IS IT YOUR UNDERSTANDING YOUR DEPARTMENT HAD A DUTY AND THE SOCIAL WORKERS IN YOUR DEPARTMENT HAD A DUTY TO DISCLOSE FACTS THAT WOULD DEMONSTRATE THE INNOCENCE OF A PARENT IN A PARTICULAR CASE?

"ANSWER: HANGING MY HAT ON THE WORD "FACTS," YES.

* * *

"QUESTION: DID YOU HAVE A POLICY TO THAT EFFECT?

[1631] "ANSWER: I DID NOT HAVE A WRITTEN POLICY TO THAT EFFECT, BUT IT WAS MY EXPECTATION.

"QUESTION: SO YOU'VE NEVER DIRECTED THAT DR. REILY PROMULGATE ANY WRITTEN POLICY TO THAT EFFECT, CORRECT?

"ANSWER: I DON'T REMEMBER DOING SO, NO."

* * *

[1633] (THE DEPOSITION TESTIMONY OF SUSAN HOLL WAS READ INTO THE RECORD AS FOLLOWS:)

* * *

"QUESTION: YOU UNDERSTAND YOU'RE UNDER OATH?

"ANSWER: YES.

* * *

[1635] "QUESTION: WHAT DO YOU DO?

"ANSWER: I MANAGE A PROGRAM OF APPROXIMATELY 75 PEOPLE. UNDER ME ARE THE DEPENDENCY INVESTIGATION UNITS, COURT OFFICER UNITS, SEARCH UNIT, AND INDIAN CHILD WELFARE ACT UNIT. I OVERSEE THE INTERSTATE COMPACT FOR PLACEMENT OF CHILDREN UNIT. THOSE ARE ACTUALLY INDIVIDUALS, NOT FULL UNITS. AND I THINK THAT'S – I THINK THAT'S IT. INTERCOUNTY TRANSFER ALSO.

* * *

[1636] "QUESTION: IS THERE A WRITTEN POLICY OR PROCEDURE OR ANY OTHER DOCUMENT NOT NECESSARILY BEARING THE TITLE POLICY OR PROCEDURE, BUT ANY

DOCUMENT THAT INSTRUCTS THE SUPERVISOR AS TO WHAT IT IS THEY'RE LOOKING FOR WHEN THEY REVIEW ONE OF THESE REPORTS PRIOR TO THE TIME IT'S SUBMITTED TO THE COURT?

"ANSWER: NOT SPECIFICALLY FOR THE SUPERVISOR.

* * *

[1653] "QUESTION: DID YOU UNDERTAKE ANY EFFORT TO LOOK FOR ANY DOCUMENTS, POLICIES, OR PROCEDURES RELATING TO ORANGE COUNTY SOCIAL SERVICES'S PROMULGATION – OR I'M SORRY. – ANY DOCUMENTS RELATING TO ORANGE COUNTY SOCIAL SERVICES'S PROMULGATION OF ANY PRACTICES OR POLICIES OR PROCEDURES RELATING TO A PARENT'S CIVIL RIGHTS?

"ANSWER: I PRINTED OUT CLIENT – THE CLIENT RIGHTS.

"QUESTION: OKAY. THAT'S –

"ANSWER: TWO OF THEM. ONE OF THEM IS FROM 2001, AND THE OTHER ONE WAS – JUST CAME OUT WITHIN THE LAST MONTH. ACTUALLY, ABOUT THE LAST TWO WEEKS. AND THAT'S THE REVISION DATED AUGUST 29TH, 2006.

"QUESTION: OKAY. AND NEITHER OF THESE, THOUGH, WERE IN EXISTENCE PRIOR TO JULY 26, 2001; CORRECT?

"ANSWER: CORRECT.

"QUESTION: DO YOU KNOW WHY THESE WERE PROMULGATED?

"ANSWER: TO PROVIDE GUIDELINES [1654] FOR ASSURING THE RIGHTS OF C.F.S. CLIENTS AS MANDATED BY STATE AND FEDERAL CIVIL RIGHTS LAWS AND REGULATIONS.

"QUESTION: OKAY. AND BY "CLIENTS" WE'RE TALKING ABOUT THE PARENTS' RIGHTS?

"ANSWER: YES. YES.

* * *

"QUESTION: SO WHAT ARE THE CONSEQUENCES FOR NOT PROVIDING ACCURATE AND COMPLETE AND OBJECTIVE REPORTS TO THE COURT?

"ANSWER: WELL, THAT'S A VERY GENERAL STATEMENT OR A VERY GENERAL QUESTION. I MEAN, IF SOMEONE WERE TO, [1655] YOU KNOW, TO KNOWINGLY FABRICATE SOMETHING OR LIE ABOUT SOMETHING, THAT COULD BE GROUNDS FOR – I MEAN, IF THEY'RE – IT SAYS IN HERE, UNDER MALICE – JUST A SECOND.

"QUESTION: WHICH ONE ARE YOU LOOKING AT?

"ANSWER: JUST A SECOND. LET ME FIND IT:

"OKAY. HERE WE GO. I'M SORRY. IT'S CLIENT RIGHTS, AND IT'S NUMBER A-0309, APPROVED JULY 26, 2001.

"ON PAGE TWO IT TALKS ABOUT LAWFUL CONDUCT BY STAFF AND CIVIL LIABILITY, AND IT DEFINES MALICE AS CONDUCT THAT IS INTENDED BY THE SOCIAL WORKER TO CAUSE INJURY TO THE PLAINTIFF OR DESPICABLE CONDUCT THAT IS CARRIED ON WITH A WILLFUL AND CONSCIOUS DISREGARD OF THE RIGHTS OR SAFETY OF OTHERS, WHICH INCLUDE PERJURY, FABRICATION OF EVIDENCE, FAILURE TO DISCLOSE KNOWN EXCULPATORY EVIDENCE, OBTAINING TESTIMONY BY DURESS, FRAUD, OR UNDUE INFLUENCE.

"AND THEN IT GOES ON TO SAY THAT [1656] IMMUNITY OF SOCIAL WORKERS FROM CIVIL LIABILITY IS NOT ABSOLUTE AND INJURY RESULTING FROM ACTS OF OMISSIONS MADE WHILE – LET ME SEE. I'M SORRY. THE CIVIL IMMUNITY OF JUVENILE COURT AND CHILD PROTECTION SOCIAL SERVICE WORKERS – I'M SORRY.

"THE CIVIL IMMUNITY OF JUVENILE COURT AND CHILD PROTECTION SOCIAL WORKERS DOES NOT EXTEND TO MALICIOUS ACTS AS DEFINED ABOVE.

"SO, CONSEQUENTLY, IT IS ESSENTIAL THAT ALL STAFF UNDERSTAND THEY MAY BE HELD PERSONALLY AND FINANCIALLY LIABLE FOR SUCH ACTS.

"QUESTION: OKAY. TO YOUR KNOWLEDGE, HAS THE AGENCY EVER DISCIPLINED A WORKER FOR MAKING AN INACCURATE STATEMENT IN A REPORT?

"ANSWER: AN INACCURATE STATEMENT?

"QUESTION: CORRECT. RIGHT.

"ANSWER: NO.

"QUESTION: AND THAT'S IN YOUR ENTIRE 20 YEARS AT THE AGENCY?

"ANSWER: YOU'RE ASKING – YOU [1657] ARE ONLY ASKING ABOUT INACCURATE STATEMENTS?

"QUESTION: CORRECT.

"ANSWER: NO.

"QUESTION: TO YOUR KNOWLEDGE, IN YOUR 20 YEARS AT THE AGENCY – ACTUALLY, MORE THAN 20 YEARS AT THE AGENCY – HAS ANY SOCIAL WORKER THAT YOU KNOW OF EVER BEEN DISCIPLINED FOR SUPPRESSING EXCULPATORY EVIDENCE?

"ANSWER: NOT TO MY KNOWLEDGE.

"QUESTION: IN YOUR 22 YEARS AT THE AGENCY – AND IT IS 22 YEARS, RIGHT?

"ANSWER: YES.

"QUESTION: IN YOUR 22 YEARS AT THE AGENCY, HAS ANY SOCIAL WORKER OR SOCIAL WORKER'S SUPERVISOR, FOR THAT MATTER, BEEN DISCIPLINED FOR MAKING AN UNTRUTHFUL STATEMENT IN A REPORT?

"ANSWER: NOT TO MY KNOWLEDGE, NO.

[1658] "IN YOUR 22 YEARS OF EXPERIENCE AT THE AGENCY, HAS ANY SUPERVISOR OR SOCIAL WORKER EVER BEEN DISCIPLINED IN ANY WAY AT ALL FOR PRESENTING UNFOUNDED EVIDENCE OR MAKING UNFOUNDED ACCUSATIONS?

[1659] "ANSWER: NO.

* * *

"QUESTION: AND YOU REMEMBER WE TALKED ABOUT THIS SOMEWHAT AT LENGTH THAT YOU WERE DESIGNATED AS THE PERSON MOST KNOWLEDGEABLE – OR, RATHER, MOST QUALIFIED TO TESTIFY ON BEHALF OF ORANGE COUNTY SOCIAL SERVICES REGARDING THE POLICIES AND PROCEDURES AS APPLIED IN THE CASE INVOLVING DEANNA FOGARTY-HARDWICK; CORRECT?

"ANSWER: YES."

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
	)	
VS.	)	
COUNTY OF ORANGE,	)	NO. 01CCO2379
MARCIE VREEKEN,	)	
ELAINE WILKINS, AND	)	
HELEN DWOJAK,	)	
	)	
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

MARCH 14, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:
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BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:
BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[2347] MARCIE VREEKEN,

CALLED AS A WITNESS BY AND ON BEHALF OF THE DEFENDANTS, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

* * *

[2489] Q I WOULD LIKE YOU TO TURN TO – ACTUALLY, LET ME ASK YOU THIS QUESTION FIRST: YOU TESTIFIED EARLIER ON YOUR DIRECT EXAMINATION ABOUT HOW YOU WERE PLAYING PHONE TAG WITH DR. MITCHELL AND WERE NEVER ACTUALLY ABLE TO GET AHOLD OF HER.

DO YOU REMEMBER THAT TESTIMONY?

A NO. I TESTIFIED THAT I HAD TALKED TO HER ON A [2490] FEW OCCASIONS.

* * *

[2492] Q SO WERE YOU ON THE STAND?

A YES. ON FRIDAY, MARCH 31ST, YES, I WAS.

Q IN FACT, YOU WERE ON – YOU WERE THE ONLY WITNESS ON THE STAND THAT DAY, RIGHT?

* * *

BY MR. MCMILLAN:

* * *

[2493] A YES.

Q AND THAT'S WHEN THE THE COURT ACTUALLY ASKED YOU WHETHER OR NOT YOU HAD – LET ME SEE HERE.

LOOK AT PAGE 202, LINE SEVEN, WHERE IT SAYS –

* * *

Q WHERE IT SAYS:

> "I HATE TO SAY THAT I ASSUME THAT IF THERE IS A PROBLEM, THAT THEY WOULD BRING THAT UP AND THAT THE AGENCY WOULD HAVE DONE SO.
>
> "MA'AM, IF YOU HAD THAT KIND OF SITUATION, YOU WOULD BRING IT TO THE COURT'S ATTENTION?"

AND WHERE IT SAYS "THE WITNESS," THAT'S YOU; RIGHT?

A YES.

Q SAYING "YES"?

A YES.

* * *

[2494] Q OKAY. AND THEN IT SAYS AGAIN:

"THE COURT: AND IN NOT BRINGING IT TO THE ATTENTION OF THE COURT AT THIS TIME, DOES THAT MEAN THAT AT THIS TIME YOU DON'T FEEL THAT YOU HAVE A SITUATION WHERE WE NEED TO ACT ON SOMETHING RIGHT THIS MINUTE?"

AND THEN, AGAIN, THE WITNESS ANSWERS: "YES."

* * *

BY MR. MCMILLAN:

Q RIGHT?

A CORRECT.

Q AND THE WITNESS WAS YOU?

A YES.

Q AND YOU GUYS WERE TALKING ABOUT THE MARJORIE MITCHELL LETTER THAT YOU TESTIFIED EARLIER CAME IN DURING THE RECESS THAT WE TALKED ABOUT ON PAGE 200, LINE 14?

* * *

THE WITNESS: YES. WE WERE TALKING ABOUT THAT LETTER, YES.

BY MR. MCMILLAN:

* * *

[2500] Q PRIOR TO THE TIME THAT YOU TOOK THE STAND ON MARCH 31ST, YOU HAD KNOWLEDGE, DIDN'T YOU, OF THE CHILDREN'S EMOTIONAL STATE?

* * *

THE WITNESS: YES, I HAD KNOWLEDGE OF THEIR EMOTIONAL STATE.

* * *

[2506] Q * * *

DID YOU MAKE THE COURT AWARE ON MARCH 31ST THAT YOU HAD RECEIVED A PHONE CALL, A PHONE MESSAGE, FROM DR. MITCHELL, SAYING THAT KENDALL SEEMS TO BE SHUTTING DOWN?

* * *

THE WITNESS: I DON'T RECALL. I DON'T THINK SO.

* * *

[2521] Q NOW, AT ANY POINT DID ANYONE WITH ORANGE COUNTY SOCIAL SERVICES AGENCY CONSIDER OR DISCUSS WITH YOU THE IDEA OF REMOVING YOU AS THE SENIOR SOCIAL WORKER AFTER THE INCIDENT ON THE 15TH?

* * *

THE WITNESS: NO.

BY MR. MCMILLAN:

* * *

MR. MCMILLAN: YOUR HONOR, I WOULD READ FROM PAGE 78, LINE 18, THROUGH 80, LINE SEVEN.

[2522] THE COURT: PAGE 78, LINE 18, THROUGH PAGE 80, LINE SEVEN.

MR. MCMILLAN: 78, 18. YES, YOUR HONOR.

THE COURT: YES, PLEASE.

MR. MCMILLAN:

"QUESTION: DID ANYONE WITH ORANGE COUNTY SOCIAL SERVICES AGENCY CONSIDER OR DISCUSS THE IDEA OF REMOVING YOU AS THE SENIOR SOCIAL WORKER AFTER MS. FOGARTY COMPLAINED THAT YOU'D LIED TO THE COURT?

"ANSWER: I DON'T RECALL.

"QUESTION: NOT THAT YOU'RE AWARE OF, RIGHT?

"ANSWER: NO. OH, CAN I INTERJECT SOMETHING?

"QUESTION: YES.

"ANSWER: IT HAPPENS ON SO MANY CASES WHERE THE PARENT IS

UNHAPPY WITH THE SOCIAL WORKER AND THEY WANT TO SWITCH; AND GENERALLY WE DON'T DO THAT BECAUSE IT'S MUCH BETTER FOR ONE SOCIAL WORKER WHO KNOWS THE STORY, WHO HAS MADE THE INTERVIEWS, TO KEEP THE CASE.

* * *

[2523] MR. MCMILLIAN:

"QUESTION: IN THESE SO MANY CASES THAT YOU TOLD ME ABOUT JUST A MOMENT AGO, IN HOW MANY OF THOSE CASES WERE THE PARENTS COMPLAINING THAT A SOCIAL WORKER HAS PERJURED HIM OR HERSELF THAT YOU'RE AWARE OF?

"ANSWER: FIFTY PERCENT OF THE CASES.

* * *

[2580] Q NOW, AFTER THIS INCIDENT ON FEBRUARY 15TH, DID YOU EVER HAVE A DISCUSSION WITH KENDALL – WITH THE CHILDREN TO DETERMINE WHAT THEY HEARD THEIR MOTHER SAY THAT EVENING, IF ANYTHING?

A YES.

Q AND LET'S START WITH KENDALL.

WHEN YOU SPOKE WITH KENDALL ABOUT THAT EVENING OF FEBRUARY 15TH, DID SHE

INDICATE TO YOU ONE WAY OR ANOTHER WHETHER OR NOT SHE HEARD HER MOTHER SAY WHAT ELAINE WILKINS SAYS SHE SAID ABOUT CARY HARDWICK –

* * *

[2581] THE WITNESS: YES.

BY MR. MCMILLAN:

Q LET ME FINISH THE QUESTION.

– ABOUT CARY HARDWICK TRYING TO TAKE THE CHILDREN AWAY FROM DEANNA FOGARTY AND PUT THEM IN A FOSTER HOME?

A YES.

Q AND DID KENDALL TELL YOU THAT SHE DID NOT HEAR HER MOTHER SAY THAT AT ALL THAT NIGHT?

* * *

THE WITNESS: KENDALL SAID THAT HER DAD SAID THAT, NOT HER MOTHER.

MR. MCMILLAN: YOUR HONOR, I WOULD READ FROM PAGE 167, OF EXHIBIT 133, OF THE TRIAL TESTIMONY OF MARCIE VREEKEN, TAKEN ON MARCH 31ST, 2000. PAGE 167, LINES 21, ALL THE WAY THROUGH 168, LINE 14.

* * *

[2582] "QUESTION: AND LET'S START WITH KENDALL.

* * *

"WHEN YOU SPOKE WITH KENDALL ABOUT THAT EVENING OF FEBRUARY 15, DID SHE INDICATE TO YOU ONE WAY OR THE OTHER WHETHER OR NOT SHE HEARD HER MOTHER SAY WHAT ELAINE SAYS SHE SAID ABOUT HER FATHER TRYING TO TAKE THEM AWAY FROM HER AND PUT THE CHILDREN IN A FOSTER HOME?

"ANSWER: SHE SAID HER MOTHER DIDN'T SAY ANYTHING BAD.

"QUESTION: DID SHE SAY IN A – DID KENDALL SAY SHE DID NOT HEAR SUCH A STATEMENT COMING FROM HER MOTHER THAT EVENING?

"ANSWER: YES.

"QUESTION: AND DID YOU TALK TO PRESLIE ABOUT WHETHER OR NOT SHE HEARD HER MOTHER THAT EVENING, THE 15TH, SAY WHAT ELAINE WILKINS SAID SHE SAID ABOUT ACCUSING THE FATHER OF TAKING THE CHILDREN AWAY FROM HER AND PUTTING THEM IN A FOSTER HOME?

"ANSWER: YES.

"QUESTION: WHAT DID PRESLIE SAY [2583] THAT SHE HEARD, IF ANYTHING?"

* * *

"ANSWER: CAN I REFER TO MY NOTES?

"SHE ALSO DENIED HEARING ANYTHING. I DON'T KNOW EXACTLY WHAT SHE SAID."

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
VS.	)	
COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, AND HELEN DWOJAK,	)	NO. 01CCO2379
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

MARCH 20, 2007

APPEARANCES OF COUNSEL:

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BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:
BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[2694] AS YOU WELL APPRECIATE, LADIES AND GENTLEMEN, YOU HAVE NOW HEARD ALL THE EVIDENCE THAT YOU WILL HEAR IN THIS CASE. THE ATTORNEYS WILL, AS I HAVE MENTIONED, HAVE ONE LAST CHANCE TO TALK TO YOU IN CLOSING ARGUMENT; BUT BEFORE THEY DO, IT IS MY DUTY TO INSTRUCT YOU ON THE LAW THAT APPLIES TO THIS CASE. YOU MUST FOLLOW THESE INSTRUCTIONS, AS WELL AS THOSE I HAVE PREVIOUSLY GIVEN YOU.

* * *

[2704] A PARTY MUST PERSUADE YOU, LADIES AND GENTLEMEN, BY THE EVIDENCE PRESENTED IN COURT THAT WHAT HE OR SHE IS REQUIRED TO PROVE IS MORE LIKELY TO BE TRUE THAN NOT TRUE. THIS IS REFERRED TO AS THE BURDEN OF PROOF. AFTER WEIGHING ALL OF THE EVIDENCE, IF YOU CANNOT DECIDE THAT SOMETHING IS MORE LIKELY TO BE TRUE THAN NOT TRUE, YOU MUST CONCLUDE THAT THE PARTY DID NOT PROVE IT.

* * *

[2706] NOW, LADIES AND GENTLEMEN, I AM COMING INTO THE PART OF THAT SECOND SET OF THE INSTRUCTIONS OR THAT SECOND PORTION OF THE INSTRUCTIONS WHERE I'LL BE GIVING YOU THE RULES THAT GOVERN THE

PARTICULAR CLAIMS PRESENTED IN THIS CASE.

THE PLAINTIFF, MS. FOGARTY-HARDWICK, CLAIMS THAT DEFENDANT[S] MARCIE VREEKEN AND ELAINE WILKINS AND HELEN DWOJAK VIOLATED HER CIVIL RIGHTS. TO ESTABLISH THIS CLAIM, THE PLAINTIFF MUST PROVE ALL OF THE FOLLOWING:

ONE, THAT MS. VREEKEN OR MS. WILKINS OR MS. DWOJAK INTENTIONALLY, BY HER WORDS OR CONDUCT, REMOVED AND/OR CAUSED THE REMOVAL AND/OR DETENTION OF PLAINTIFF'S CHILDREN FROM PLAINTIFF'S CUSTODY OR [2707] OTHERWISE INTERFERED WITH HER RIGHTS AS A PARENTS [sic];

TWO, THAT SUCH DEFENDANT WAS ACTING OR PURPORTING TO ACT IN THE PERFORMANCE OF HER OFFICIAL DUTIES;

THREE, THAT DEFENDANT'S CONDUCT VIOLATED THE PLAINTIFF'S RIGHT OF FAMILIAL ASSOCIATION, INCLUDING HER RIGHT TO THE CARE AND CUSTODY OF HER TWO MINOR CHILDREN, KENDALL AND PRESLIE HARDWICK, OR VIOLATED THE PLAINTIFF'S RIGHT OF PRIVACY;

NUMBER FOUR, THAT MS. FOGARTY-HARDWICK WAS HARMED;

AND, NUMBER FIVE, THAT DEFENDANTS' CONDUCT WAS A SUBSTANTIAL FACTOR IN THE PLAINTIFF'S HARM.

PLAINTIFF FOGARTY-HARDWICK ALSO CLAIMS SHE WAS DEPRIVED OF HER CIVIL RIGHTS AS A RESULT OF OFFICIAL POLICIES AND/OR CUSTOMS OF THE SOCIAL SERVICES DIVISION OF THE COUNTY OF ORANGE.

TO ESTABLISH THIS CLAIM, PLAINTIFF MUST PROVE ALL OF THE FOLLOWING:

NUMBER ONE, THAT EITHER MS. VREEKEN OR MS. WILKINS OR MS. DWOJAK INTENTIONALLY, BY WORDS OR CONDUCT, REMOVED OR CAUSED THE REMOVAL AND/OR DETENTION OF PLAINTIFF'S CHILDREN FROM PLAINTIFF'S CUSTODY OR OTHERWISE INTERFERED WITH HER RIGHTS AS A PARENT;

TWO, THAT THE CONDUCT OF AT LEAST ONE OF THOSE DEFENDANTS OCCURRED AS A RESULT OF AN OFFICIAL POLICY OR [2708] CUSTOM OF THE COUNTY OF ORANGE SOCIAL SERVICES AGENCY;

THREE, THAT THE PLAINTIFF WAS HARMED;

AND, FOUR, THAT EITHER MS. VREEKEN, MS. WILKINS, OR MS. DWOJAK'S CONDUCT WAS A SUBSTANTIAL FACTOR IN CAUSING PLAINTIFF'S HARM.

A TERM I USED WAS "OFFICIAL POLICY" OR "CUSTOM." THAT MEANS A CUSTOM THAT IS A PERMANENT WIDESPREAD OR WELL SETTLED PRACTICE OF THE COUNTY, OR ANY ACT OR OMISSION APPROVED BY THE COUNTY'S LAW MAKING OFFICER OR POLICY-MAKING OFFICIAL.

MS. FOGARTY-HARDWICK CLAIMS THAT SHE WAS DEPRIVED OF HER CIVIL RIGHTS AS A RESULT OF THE ORANGE COUNTY SOCIAL SERVICES AGENCY'S FAILURE TO TRAIN AND/OR SUPERVISE ITS EMPLOYEES.

TO ESTABLISH THIS CLAIM, PLAINTIFF MUST PROVE ALL OF THE FOLLOWING:

NUMBER ONE, THAT THE ORANGE COUNTY SOCIAL SERVICES AGENCY'S TRAINING PROGRAM WAS NOT ADEQUATE TO TRAIN ITS EMPLOYEES PROPERLY TO HANDLE USUAL AND RECURRING SITUATIONS AND/OR ITS SOCIAL WORKERS WERE NOT ADEQUATELY SUPERVISED IN THEIR HANDLING OF USUAL AND RECURRING SITUATIONS;

NUMBER TWO, THAT THE ORANGE COUNTY SOCIAL SERVICES AGENCY WAS DELIBERATELY INDIFFERENT TO THE NEED TO TRAIN AND/OR SUPERVISE ITS EMPLOYEES ADEQUATELY;

NUMBER THREE, THAT THE FAILURE TO PROVIDE [2709] PROPER TRAINING AND/OR SUPERVISION WAS THE CAUSE OF THE

DEPRAVATION OF MS. FOGARTY-HARDWICK'S RIGHT TO THE CARE AND CUSTODY OF AND ASSOCIATION WITH HER CHILDREN OR HER RIGHT OF PRIVACY. THAT IS TO SAY, THAT THIS ACTION DEPRIVED HER OF HER RIGHT OF FAMILIAL ASSOCIATION WITH HER CHILDREN OR OF HER RIGHT OF PRIVACY;

NUMBER FOUR, THAT MS. FOGARTY-HARDWICK WAS HARMED;

AND, NUMBER FIVE, THAT ORANGE COUNTY SOCIAL SERVICES AGENCY'S FAILURE ADEQUATELY TO TRAIN AND/OR SUPERVISE ITS EMPLOYEES WAS A SUBSTANTIAL FACTOR IN CAUSING THE PLAINTIFF'S HARM.

A COUPLE MORE DEFINITIONS FOR YOU LADIES AND GENTLEMEN.

DELIBERATE INDIFFERENCE IS THE KNOWING OR RECKLESS DISREGARD OF THE CONSEQUENCES OF ONE'S ACTS OR OMISSIONS. TO ESTABLISH DELIBERATE INDIFFERENCE, MS. FOGARTY-HARDWICK MUST PROVE THAT ORANGE COUNTY SOCIAL SERVICES AGENCY KNEW OR SHOULD HAVE KNOWN THAT ITS FAILURE TO PROVIDE REASONABLE TRAINING AND/OR SUPERVISION WOULD LIKELY RESULT IN A VIOLATION OF THE RIGHT TO FAMILIAL ASSOCIATION OR THE RIGHT TO PRIVACY OF MS. FOGARTY-HARDWICK.

I USED THE TERM "SUBSTANTIAL FACTOR" IN SEVERAL OF THE RULES THAT I'VE GIVEN YOU THUS FAR. A SUBSTANTIAL FACTOR IN CAUSING HARM IS A FACTOR THAT A REASONABLE [2710] PERSON WOULD CONSIDER TO HAVE CONTRIBUTED TO THE HARM. IT MUST BE MORE THAN A REMOTE OR TRIVIAL FACTOR. IT DOES NOT HAVE TO BE THE ONLY CAUSE OF THE HARM.

IF YOU DECIDE THAT MS. FOGARTY-HARDWICK HAS PROVED ANY OF HER CLAIMS AGAINST DEFENDANTS, YOU MUST ALSO DECIDE HOW MUCH MONEY WILL REASONABLY COMPENSATE THE PLAINTIFF FOR THAT HARM. THIS COMPENSATION IS CALLED DAMAGES.

* * *

[2712] NOW, THE ARGUMENTS OF THE ATTORNEYS ARE NOT EVIDENCE OF ANYTHING AND THEY'RE CERTAINLY NOT EVIDENCE OF DAMAGES. YOUR AWARD MUST BE BASED ON YOUR REASONED JUDGMENT, APPLIED TO THE TESTIMONY OF THE WITNESSES AND THE OTHER EVIDENCE THAT HAS BEEN ADMITTED DURING TRIAL.

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
VS.	)	NO. 01CCO2379
COUNTY OF ORANGE, ET AL.,	)	
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

MARCH 21, 2007

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LAW OFFICES OF SHAWN A. MCMILLAN
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FOR DEFENDANTS:
BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[2776] A PERSON'S CONDUCT, LADIES AND GENTLEMEN, MAY COMBINE WITH ANOTHER FACTOR TO CAUSE HARM. IF YOU FIND THAT DEFENDANTS' CONDUCT WAS A SUBSTANTIAL FACTOR IN CAUSING PLAINTIFF'S HARM, THEN DEFENDANT IS RESPONSIBLE FOR THE HARM AND DEFENDANT CANNOT AVOID RESPONSIBILITY JUST BECAUSE OTHER PERSONS OR CONDITIONS OR EVENTS WAS ALSO A SUBSTANTIAL FACTOR IN CAUSING PLAINTIFF'S HARM.

* * *

[2779] COUNSEL WILL GIVE YOU SUGGESTIONS. IF THEY DISAGREE OR IF THEY ARE DISCORDANT WITH YOUR RECOLLECTION, YOUR RECOLLECTION OF COURSE CONTROLS. YOU MAKE THOSE DECISIONS. AND YOU HAVE THAT RESOURCE AVAILABLE TO YOU IF YOU WISH TO CALL UPON THE COURT REPORTER.

* * *

[2835] MR. STEBENS, PLEASE.

MR. STEBENS: THANK YOU.

* * *

[2849] THE SECOND IS, WERE THEY ACTING IN AN OFFICIAL CAPACITY. AND, AGAIN, AS MR. MCMILLAN SAID, WE'VE ADMITTED THAT AT ALL TIMES THAT THE SOCIAL WORKERS WERE ACTING – IN THIS CASE WERE ACTING AS EMPLOYEES OF THE COUNTY OF ORANGE.

* * *

[2853] NOW, GOING BACK TO FEBRUARY 15, 2000, ITSELF, CERTAINLY, AS MR. MCMILLAN INDICATED, WE'RE TALKING ABOUT A CREDIBILITY ISSUE. DO YOU BELIEVE WHAT THE MOTHER HAD TO SAY? DO YOU BELIEVE WHAT THE SOCIAL WORKERS HAD TO SAY ABOUT WHO MADE THIS STATEMENT?

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK,	)	
PLAINTIFF,	)	
VS.	)	NO. 01CCO2379
COUNTY OF ORANGE, ET AL.,	)	
DEFENDANTS.	)	

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

MAY 14, 2007

APPEARANCES OF COUNSEL:

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ATTORNEY AT LAW

FOR DEFENDANTS: BEAM, BROBECK & WEST
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JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[3004] SANTA ANA, CALIFORNIA –
MONDAY, MAY 14, 2007

AFTERNOON SESSION

* * *

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT:)

* * *

THE COURT: OUR TOPIC THIS AFTERNOON IS THE REQUEST FOR INJUNCTIVE RELIEF.

* * *

[3016] THE COURT: IN THE COURSE OF ALL THE TESTIMONY WE HEARD, I SUPPOSE DIFFERENT SNIPPETS OF TESTIMONY AFFECT DIFFERENT PEOPLE IN DIFFERENT WAYS.

BUT THE COURT WAS MOST TAKEN ABACK BY THE TESTIMONY THAT IT IS THE STANDARD OPERATING PROCEDURE OF THE COUNTY OF ORANGE SOCIAL SERVICES AGENCY TO MAKE A CHARGING ALLEGATION AGAINST BOTH PARENTS WHENEVER A CLAIM IS INITIATED AGAINST ONE. THAT IS TO SAY, IT IS STANDARD OPERATING PROCEDURE TO ALLEGE A FAILURE TO PROTECT [3017] WITHOUT ANY FURTHER INFORMATION, OTHER THAN THE FACT THAT THERE MAY BE EVIDENCE THAT ONE PARENT HAS BEEN NEGLECTFUL OR HARMFUL.

AND I'VE BEEN TRYING TO THINK WHY THAT EVIDENCE, THAT BIT OF TESTIMONY, AMONG ALL THE THINGS THAT OCCURRED IN THIS TRIAL, WAS MOST NOTEWORTHY TO THE COURT. AND I DON'T HAVE A GOOD ANSWER

EXCEPT THAT THE COURT IS TRAINED TO THINK IN TERMS OF PROPER PLEADINGS, SUFFICIENT JUSTIFICATION, THE RULES OF ETHICS WHICH ARE IMPOSED UPON LAWYERS REQUIRING THAT CHARGING ALLEGATIONS BE BASED UPON SOME DEFINABLE REASON TO BELIEVE THAT THERE IS CAUSE FOR SUCH A CLAIM.

IT MAY BE THAT NOT COMING TO THIS COURT AS A MOTHER, NOT COMING TO THIS COURT FOR SOME TIME AS A CHILD, NOT REALLY COMING TO THIS COURT FOR SOME TIME AS A PARENT OF A CHILD THAT MIGHT BE WITHIN THE CONTROL OF THE COURT – IT WAS THAT BIT OF EVIDENCE THAT STRUCK THE COURT, WHICH HAS AT THIS POINT ITS PRINCIPAL LIFE EXPERIENCE AS AN ARBITER OF PLEADINGS AND LEGAL ISSUES. THAT WAS THE EVIDENCE THAT STRUCK ME AS REALLY DISCORDANT. AND AT THE TIME I HEARD IT, I WAS TROUBLED.

I GIVE CREDIT TO THE PLAINTIFF FOR DEFINING THE PROPOSED INJUNCTION IN TERMS OF THAT REGULAR ACKNOWLEDGED PRACTICE OF THE SOCIAL SERVICES AGENCY.

I DON'T THINK THERE IS ANY OF US THAT COULD SAY THAT THAT IS CORRECT, TO MAKE SUCH A CHARGING ALLEGATION [3018] WITH NO SUPPORTING EVIDENCE. AND THE COUNTY ACKNOWLEDGES THAT IT DOES SO.

SHOULD WE ENTER AN ORDER TO THAT EFFECT? YES, WE SHOULD. THAT PRACTICE SHOULD BE TERMINATED.

* * *

EXHIBIT NO. 39

* * *

FEB ~~27~~ 2007 FEB 14 2007

☒ IN EVIDENCE (Date) FEB 27 2007

* * *

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CALIFORNIA LICENSES
PSY 7257 & MPT 8645

March 31, 2000 SENT BY FACSIMILE & US MAIL

To: Marcy Vreeken, CSW
Department of Children & Family Services

Re: Matter of Hardwick

Dear Ms. Vreeken,

This progress report on the psychotherapy of Kendall and Preslie Hardwick is a follow up to the telephone message that I left earlier today. During the time that Kendall and Preslie were placed in Orangewood I had the opportunity to visit them on two separate occasions for over an hour each time. I also was able to speak to Kendall over the telephone several times

during the same period. During this time I found Preslie to be angrily acting out. Her older sister, Kendall, was often tearful throughout the visit and would cling to this psychologist prior to leaving.

In addition, I had the opportunity to evaluate both girls yesterday after their foster mother, Sheryl Gibson, drove them to my office for the one hour session. Yesterday I found Preslie to be greatly relieved that she was out of Orangewood although very sad to be in a foster home, even though Ms. Gibson has been excellent with them.

Of greatest concern was Kendall who shows signs of emotional regression. She was tearful throughout the session, begging to go home. Her affect was flattened which is a sign of emotional blunting. Kendall appears terrified in a new school and pleaded to return to her mother's home. She cannot concentrate at school, as she thinks nonstop of being back with mother and Rosie, her nanny. Throughout the session Kendall showed signs of extreme emotional lability, often breaking into tears. She doesn't know how much longer she can cope and visibly shook while relating this to this psychologist.

This child had been diagnosed as being mildly autistic. These children have great difficulty with changes and transitions. They are prone to extreme anxiety when their structured life has been interrupted. Kendall was terrified of noises from other offices and seemed on edge as though [sic] anticipating the unexpected.

As their psychologist I am very worried about the girls, particularly Kendall. She appears to be highly stressed and not handling the prolonged placement. It is clinically a concern that Kendall appears to be withdrawing into herself which is not in her best interest as an autistic child. This child is in immediate need of stability and structure in her life. The separation from her caretakers has been highly traumatic for her and I am concerned that a prolonged placement will further deteriorate her level of functioning. I strongly encourage and request that the matter of the children's placement be reviewed with careful attention given to the regression in Kendall's socioemotional functioning.

Thank you for your attention to this concern.

Respectfully yours,

/s/ Marjorie Cain Mitchell, Ph.D.
Marjorie Cain Mitchell, Ph.D.
Clinical and Forensic Psychologist

EXHIBIT NO. 164

* * *

☒ IN EVIDENCE (Date) MAR 06 2007

* * *

April 8, 2000

Ms. Helen Dwojak
Social Services Agency Children and Family Services
POB 14174/301 The City Drive
Orange, CA 92863-1574
(cc: Inclusive, Extensive and Ongoing)

RE: Kendall and Preslie Hardwick

Ms. Dwojak:

I must admit that after the rude and boorish treatment you gave me during yesterday's phone call, I was a little taken aback. You hung up on me at just the perfect time for me to realize that you know what I know: Namely, you have NO CASE against my sister-in-law, Deanna Hardwick. You've stolen her children from her without good or legal cause, and you have NO idea what to do about it. The manner in which you so easily controlled our conversation with your abusive power over the situation when I was simply asking for some honest answers to very simple questions is quite disconcerting. You had no intelligible answer to any of my questions because you obviously aren't accustomed to nor will you tolerate being questioned. As to the matter of Deanna Hardwick, all your answers are contradictory. Therefore, you simply hold hostage her children, avoid any questioning, and pretend there are horrendous innuendoes behind

questions asked by a concerned parent and a family member. It is due to this type of ill treatment by your organization that I have become increasingly concerned for my nieces and their well being under your "care." It was this same type of ill treatment that led to Kendall's ongoing abuse for 4 years by her father, as your office did nothing when her mom first came to you for help. Your office is doing an even worse job now that Kendall is actually talking about the molestation.

I understood you to be a supervisor. What I witnessed in our conversation was far beyond the nightmares I had already experienced with your subordinates (Marcia [sic] Vreeken and Patricia Dumas). During that call and the preceding messages left you, I made it clear as a tax payer, an American citizen, and a concerned and loving uncle, I was simply requesting reasonable answers to some very important questions I had concerning my nieces, as well as why I have been subjected to once a week visits when there are no allegations about me at all in this. I requested to discuss these issues quickly and calmly due to my recent heart attack. You chose instead to take that request as either a joke or an opportunity to play on my physical weakness as you began the conversation with a controlling, aggressive and impolite manner from the onset. And it only got worse from there.

At this point, I have received nothing but conflicting and nonsensical reasoning as to why my entire family and I suddenly one day were put on monitored visits once a week when seeing my nieces. The excuse I was

given from Ms. Vreeken (which she will surely not deny) was that "Kendall told her that she was told by a social worker that she would be released from the facility the following day." Apparently and conveniently this is one of the BIG-no-no's at your facility. Marcia [sic], rather than ask Kendall which social worker told her this (or even assume that Kendall wanted out of there so badly that perhaps she misinterpreted something one of your workers said), used that as a lame excuse to excommunicate my entire family from freely visiting our nieces. Now it is impossible for any normal or regular visits from any of us, as we all have jobs. In short, she punished both my entire family, who is not on trial, as well as the girls – whom you are suppose[d] to be protecting and strengthening – by not allowing us reasonable access to them so we can give them our loving support which they are accustomed to enjoying. While Marcia's [sic] reasoning was absurd, it is consistent with how your office has handled this case. (Maybe a social worker *really did* tell Kendall she would be released to go home.)

Your office is clearly up against the wall with regards to evidence against Deanna (or the lack thereof). Apparently your only recourse is to simply abuse your authority and create problems for her; because as you well know, there is NO EVIDENCE of ANY abuse (verbal, physical, or any other) that you can lawfully use against Deanna Fogarty-Hardwick. How dare you and your staff misuse the authority we the people have entrusted you with!

I wonder if you are familiar with the following: "The Mission of the California Department of Social Services is to *serve, aid,* and *protect* needy and vulnerable children *and* adults in ways that *STRENGTHEN* and *preserve families*, encourage *personal responsibility*, and *foster independence*." Ms. Dwojak, you and your co-workers have CLEARLY forgotten what your main focus is with regard to your job and obligations therein. My experience with all three of you has been filled with nothing but abuse – the very antithesis of your mission statement.

Ms. Dwojak, you made several unfounded statements to me such as, "YOUR ENTIRE FAMILY IS CRAZY," as well as "EVERYONE IN COURT IS LYING" (interesting you mentioned that one, since the only parties I understand to have taken oath and testified so far are your co-workers and my brother, the accused). How can you make an assessment having NO knowledge of my family or me? You also told me that I was on monitored visits "BECAUSE *I* SAY SO," and you refused to even discuss the reason Marcia [sic] had given to me in front of several witnesses. I tried to tell Marcie yesterday that she is pre-judging some very good people. I mentioned to Marcie that one such person she pre-judged is the Chaplain for both the FBI and the LA Fire Department (grandfather, Bob Smalley) entrusted by them through extensive background searches to minister to special agents and firefighters. Marcie simply laughed in jest, much the same as she had done months prior to my autistic niece ("slightly autistic," as Marcia [sic] likes to

flippantly describe her) when Kendall described to her that one of your people was "threatening." "Threatening" being a term your office and the court ignorantly describe as being one a fourth grader should not have in her vocabulary. My wife, Nicole Hardwick, is an educator holding a master's degree in education and is very experienced not only with children of this age, but autistic children as well. She took a survey of several third and fourth graders on this topic and has literally dozens of written statements from these children showing proof that not only refutes that ridiculous opinion, but makes the opinion appear as ignorant as just about every other decision this court and your office has made.

Therein lies my deepest concern. Kendall has told me personally that the horrid molestation she experienced at the hands of my biological brother, Cary Hardwick, did in fact happen. And I believe her. Rachel Davis, Marcia [sic] Vreeken and Patricia Dumas have all told me they believe Kendall as well. But if you and your attorneys continue to proceed as ignorantly as you have with regards to Deanna, Cary will get away with some horrific crimes. You will once again be responsible for placing those children back in the hands of their molester father.

Let me make this clear: I will not rest nor will I stop telling anyone who will listen regarding this injustice. Cary Hardwick, Deanna Fogarty-Hardwick, and your office are held under a gag order not to discuss this case. I am not. I told you this yesterday and I have already started the process. When the public learns of

your abusive, uncaring treatment of a former Miss California, a loving and protective mother, and a wonderful human being who came to you asking for protection for her autistic 9 year old abused daughter who was crying out for help, I am sure they will be as appalled as I am. I just pray to God the right people are held accountable for their actions.

Sincerely,

/s/ Kevin C. Hardwick
Kevin Hardwick
Long Beach, CA

cc: Mike McMichael (Program Manager),
Marcia [sic] Vreeken and Patricia Dumas of
Social Services, Orange CA
Ms. Rita Saenz, Director CA Dept. of
Social Services, Sacramento CA
Mayor Christina Shea of Irvine
Judge Robert Hudson of Orange
Mary Shumate & Assoc., and Deanna Hardwick
To the press in general, which I have already
begun via network e-mails open-ended.

EXHIBIT NO. 313

* * *

☒ IN EVIDENCE (Date) MAR 01 2007

* * *

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April 14, 2000

EVIDENCE CODE SECTION 1152
PROTECTED COMMUNICATION

Joyce Riley, Deputy
Orange County Counsel
10 Pacific Center Plaza
P.O. Box 1379
Santa Ana, CA 92702

Re: In the Matter of Kendall Hardwick and Preslie Hardwick DP 002 001, DP 002 002, Orange County Superior Court – Juvenile Division, DSS No. 0D57376

Dear Joyce:

This letter is intended to be an *Evidence Code* Section 1152 communication written in an effort to reserrect discussions concerning the resolution of the Section 300(c) counts filed against Deanna Hardwick consistent with previous discussions between County Counsel, Social Services and all counsel. This communication also will address certain other issues of recent vintage in an attempt to resolve same. This communication is also addressed to County Counsel, since County Counsel represents Social Services, although most of the comments and topics addressed herein pertain to Social Services and not County Counsel.

It is with great consternation that I am compelled to write this communication.

I am most disturbed and disgusted, yet I am not surprised, based on the conduct of the Orange County Social Services Agency and the participation and callous conduct of certain of its social workers involved in the current events of this particular case, upon receiving certain recent information in this case that I will address hereinafter.

To place my comments and statements referred to herein in proper context and perspective, a brief updating and factual chronology is necessary.

On or about November 16, 1999, a Juvenile Dependency Petition under Welfare and Institutions Code §300 was filed against Mr. Cary Hardwick

(hereinafter referred to as "father") for alleged molestation claims brought by his daughter Kendall Hardwick, specifically Section 300(d), for sexual abuse. At this time, the children remained in the custodial care of their mother, Deanne [sic] Hardwick (hereinafter referred to as "mother"), notwithstanding the filing of a First Amended Petition on or about January 6, 2000, alleging unfounded 300(c) counts involving mother, until approximately February 17, 2000, at which time referee Gary Bischoff in Department L31 of the Orange County Superior Court – Juvenile Division ordered the removal of the Hardwick children from their mother's custody, without a hearing, without taking testimony or sworn affidavits, after an off-the-record discussion with counsel, without affording mother the right to "due process," without knowing the social worker, on February 17, 2000. Marcie Vreeken, (who was present in Court) recommended (1) that mother should continue to have custody of the Hardwick children, (2) the children should not be removed from the mother by the court based on her investigation to date, and (3) that there was no conduct by mother that warranted removal of the children. Unfortunately and most regrettably, Ms. Vreeken did not step forward and intervene with the Court at said hearing to voice her opinion and recommendations to protect the Hardwick children at that time, and remained silent on that issue. I am also uncertain why County Counsel on behalf of Social Services did not intercede to make Social Services' position clear to the Court to avert the removal of the

children from Mother contrary to Social Services' recommendation.

As a matter of fact, based on the testimony of Marcie Vreeken and Rachel Davis during the pending trial, mother had not violated any court orders, had not frustrated or interfered with any of father's visitation, had not coached or alienated the children, had cooperated with scheduled visitations and the Social Services social workers established rules and procedures, and that there was no evidence or facts to their knowledge at that time to support any order of the Court taking the children away from mother.

The nightmare continues unabated, without proper resolution.

On or about the week of March 28, 2000, prior to commencing trial testimony it was discussed with Marcie Vreeken (social worker), County Counsel, mother's counsel, father's counsel, children's counsel, and reported by Social Services (Marcia [sic] Vreeken) that the children were (as reported by Pat Dumas (social worker)) becoming more and more depressed and in a serious psychological state (flat effect, etc.), serious enough to warrant a recommendation that the children attend an emergency session with Dr. Mitchell, the children's psychologist (of approximately one year), to deal with the Hardwick children and this critical situation. The children were eventually seen by Dr. Mitchell (in therapy) on March 29, 2000 (the day after a missed appointment by the foster parent),

and issued her report on March 31, 2000, at the request of Social Services.

Additionally at that time, Ms. Vreeken stated that it would be appropriate under the circumstances that the children be returned to their mother's custody, (the children expressed a strong desire to return home to their mother), back in their own respective schools, and placed back into their normal family environment, situation and structure to stabilize these children.

On or about that date, all parties and counsel attempted to resolve the situation informally, which included a discussion involving dismissing all of the "c" counts filed against mother, Mrs. Hardwick, (since the court had previously indicated (based on the comments of County counsel, other counsel and the state of the evidence and informal offers of proof), that it was questionable and improbable that County Counsel could sustain the "c" counts against mother given the state of the evidence and the anticipated failure of carrying the burden of proof) and even discussing submitting the matter involving the "c" counts to the court for decision based on the evidence presented to date (anticipating that the Court would dismiss the "c" counts), which would result in immediately returning the children to their mother. Although Ms. Vreeken had recommended such a process (and did not oppose same), her recommendation was immediately overridden by her supervisor, Ms. Dwojak, who apparently aborted the resolution process and refused to allow Social Services to recommend the return of

the children to their mother or proceed as previously discussed, without any explanation or cause, in a rude and belligerent manner, and which prevented County Counsel from proceeding as previously discussed herein.

On or about March 31, 2000, Dr. Mitchell issued a written report (a copy is enclosed herein) wherein she opined the following:

1. "Kendall . . . shows signs of emotional regression."

2. "She [Kendall] was tearful throughout the session, begging to go home."

3. "Kendall appears terrified in a new school and pleaded to return to her mother's home."

4. "Her affect was flattened which is a sign of emotional blunting."

5. "Throughout the session, Kendall showed signs of extreme emotional liability, after breaking into tears."

6. "She [Kendall] doesn't know how much longer she can cope and visibly shook while relating this to this psychologist."

7. "These children have great difficulty with changes and transitions." [Kendall is diagnosed as being mildly autistic].

8. "They are prone to extreme anxiety when their structured life has been interrupted."

9. "As their psychologist, I am very worried about the girls, particularly Kendall."

10. "She [Kendall] appears to be highly stressed and not handling the prolonged placement."

11. "It is clinically a concern that Kendall appears to be withdrawing into herself . . ."

12. "I strongly encourage and request that the matter of the children's placement be reviewed with careful attention given to the regression in Kendall's socio-emotional functioning."

Notwithstanding Dr. Mitchell's clinical concern for the children's deteriorating emotional functioning and her recommendation that the children are in immediate need of stability and structure (returned to their caretaker (mother)), Social Services (and County Counsel) has done nothing in this regard to protect the Hardwick children, return the children to their mother, or act on Dr. Mitchell's recommendation. I might add that Dr. Mitchell has been the children's psychologist for approximately one year and has established a very close, comfortable and trusting professional bond and relationship with these children which has enhanced the therapeutic process to insure success in treatment.

I do not understand why Social Services (and County Counsel) has blatantly refused to act on Dr. Mitchell's report and recommendation (since they

refused to explain their position or discuss the matter with counsel) which belies any sense of responsibility or integrity on the part of Social Services or any modicum of protection or resolution for the Hardwick children.

It has become blatantly obvious since the introduction of Ms. Vreeken and Ms. Dwojak into this case, after the termination of Rachel Davis as social worker in this matter, that Social Services has lost sight of why the original Petition was filed (molestation and sexual abuse charges against the children's father) and for reasons only known to the Social Services Agency, Social Services has elected to shift its focus to mother and has been attempting to, not only attack and discredit her wrongfully, but has for the most part engaged in miscommunication and/or fabrication to place Ms. Hardwick in poor light, rather than focusing its effort on the 300 "d" counts which are most paramount in this situation to protect these children. Social Services has shown a total lack of responsibility and duty to protect the Hardwick children, and instead has carried on a relentless witch-hunt campaign against Mrs. Hardwick (mother) at the expense of its case against Mr. Hardwick. Shame on Social Services! Shame on their resolve to travel the wrong road in this litigation at the expense of these children.

There is now another serious situation that has raised its ugly head in this matter and again illustrates Social Services' continued lack of responsibility and duty to protect the Hardwick children and to do

the right thing. Mother is most concerned and upset over this matter. It has been requested by Ms. Hardwick and recommended by Dr. Mitchell that the children should attend psychological therapy sessions with Dr. Mitchell at least once per week to assist the children in their emotional difficulties.

It has also come to our attention that although the children were seen on an emergency basis on March 29, 2000, the children have not been seen by Dr. Mitchell since that date (almost three weeks now) and this is very disconcerting and upsetting to Ms. Hardwick. When will this nightmare end? When will Social Services' irresponsibility stop for the Hardwick children?

We also understand that Social Services has taken the position that it is inconvenient for the foster parents and Social Services to transport the children from wherever they are located with the foster parents (in South Orange County, next to North San Diego County) to Dr. Mitchell's office in Long Beach, to facilitate the once a week therapy sessions. It is really a shame and a tragedy that Social Services did not think of this contingency situation or problem before they irresponsibly acted in this matter and placed the children in foster care in the furthest point of the Orange County line, next to San Diego. Had Social Services placed the children into a foster care placement in the Long Beach or Seal Beach area, (there was a Seal Beach alternative available), we would not be experiencing any of these problems, and

the children would be back in their normal school (near their friends) where they belong.

It is also our understanding that since Social Services cannot accommodate Dr. Mitchell's once a week therapy sessions for the children, that it is now probable that the children will have to be attending psychological therapy sessions with a substitute therapist that is located closer to the foster parents' home, which means that they would have to sever their professional ties with Dr. Mitchell and which again, will probably be most traumatic and emotionally damaging to these children. You will recall that Dr. Mitchell opined that the "children have great difficulty with changes and transitions." Apparently Social Services is not listening or choose to ignore such advice.

Be advised that Ms. Hardwick does not approve of or consent to such a severance of the psychotherapist-patient relationship between Dr. Mitchell and the children, and she is requesting that the Social Services do all that it can to provide transportation for the children from the foster home placement to Dr. Mitchell's office once a week to attend these sessions. Ms. Hardwick *adamantly opposes* such a move to provide a new therapist for the children at this time given what Dr. Mitchell has classified as their fragile emotional state.

In the event Social Services or the foster parents are not willing to do so, Ms. Hardwick proposes that she will pay and arrange for (with the approval of Social Services) a transportation method so the

children can be transported from the foster home to Dr. Mitchell's office once a week to attend their therapy without any inconvenience or cost or obligation to the Agency or the foster parents.

Ms. Hardwick has been most cooperative with Social Services in this very difficult time for her considering that Social Services has effectively taken the children away from her without just cause (and continue to have the children away from her without just cause) and she has been met with subterfusion, delays, excuses, non-communication, fabrication, and irresponsible action on the part of Social Services. There have been instances when Social Services social workers have failed to give pertinent information to Ms. Hardwick or her counsel and then a week or so later, claimed to have given such information, and same was false (among numerous other examples).

Given the history of this case and the horrible conduct of Social Services and its social workers, I must request that any communication between Social Services and Ms. Hardwick, be done in writing and hand delivered to Ms. Hardwick's counsel or Ms. Hardwick, who will be present in court every afternoon from 1:30 p.m. to 5:00 pm., until trial is over, which I estimate will be another two or three weeks. There should be no excuse that social workers have no access to Ms. Hardwick or her counsel since they can be found daily in the afternoon across the mezzanine at the courthouse in Department 31 in Orange County.

As an aside, given the upcoming Easter vacation, Ms. Hardwick is requesting that she be allowed to attend her church services at her and the children's church in Seal Beach with the children on Easter Sunday and that Social Services provide the appropriate monitor or she will pay for a private monitor recommended by Social Services to facilitate same. This request has been previously made verbally to Ms. Vreeken, but we have had no response to date. Now this demand and request is made in writing and I expect a response no later than Monday, April 17, 2000, since Ms. Vreeken will be testifying in the afternoon on that date and available for response.

In closing, and in an effort to resurrect settlement resolution in this matter, I can only state that it is most unfortunate and regrettable that the Hardwick children remain away from their mother and detained in foster care placement, for no just cause, and that the children continue to remain on a day to day basis in such a precarious and damaging situation, which only adds to the tremendous emotional strain and stress that they have suffered since their removal from their mother on February 17, 2000. With every day passing, the Hardwick children suffer additional psychological and emotional damage and trauma, not to mention the tremendous stress and strain and emotional distress suffered by Ms. Hardwick due to the loss of her children at the hands of Social Services. I urge Social Services to reconsider its conduct in this matter, reconsider its recommendations, and urge Social Services and County Counsel

to take the initiative, as directed by Judge Bischoff, to terminate the foster care placement of these children and return them to their mother immediately.

Referee Bischoff on more than one (1) occasion has commented in open court to Ms. Vreeken and all counsel that Social Services has the absolute discretion and authority (without the need for a court order) to return the Hardwick children to their mother, if they deem it appropriate, notwithstanding the "c" counts or pending trial. Tragically, his comments have fallen on deaf ears. I trust my message has been heard loud and clear and immediate settlement discussions commence to resolve this matter without further delay.

Very truly yours,

Peter T. Hermes

PTH:It

cc: Ms. Deanna Hardwick
Rita Sanez, Director of California Department of Social Services
Larry Leaman, Director of Orange County Social Services Agency
Mike McMichael, Program Manager
Helen Dwojak, Social Services Supervisor
Marcie Vreeken, Senior Social Worker

No. G039045

COURT OF APPEAL – FOURTH DISTRICT

DIVISION THREE

STATE OF CALIFORNIA

FOGARTY-HARDWICK

vs. NO. 01CC02379

COUNTY OF ORANGE

APPEAL FROM THE
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE

HONORABLE RONALD L. BAUER,
JUDGE/COMMISSIONER

CLERK'S TRANSCRIPT

(Filed Nov. 6, 2007)

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[SEAL]

GOVERNOR'S OFFICE

October 16, 1995

To the Members of the California Assembly:

I have today signed Assembly Bill No. 1355.

This bill would provide that the civil immunity of juvenile court social workers, child protection workers and other public employees authorized to initiate or conduct investigations or proceedings pursuant to the juvenile court law shall not extend to acts of perjury, fabrication of evidence or obtaining testimony by duress fraud or undue influence if any of these acts are committed by malice.

Social Workers practicing in the child dependency area are burdened with the extraordinary task of deciding when to set into motion the procedures for removing children from homes in which they may be

endangered. Statutory provisions and the courts have conferred upon them extraordinary authority and absolute immunity from civil liability for any abuse of their authority.

There is good reason for those charged with protecting the most vulnerable of Californians to be armed with exceptional powers. Nonetheless shielding public employees from liability when they have engaged in malicious and egregiously false and wrongful conduct cannot be justified.

Several recent cases have graphically illustrated that some social workers abuse their absolute immunity in ways that subject children to harm much greater than any that existed in their homes. AB 1355 seeks to preserve the ability of social workers to perform their duties to protect children with honest zeal, but not malice that destroys innocent reputations, and destroys families.

The child protection system is designed to protect children from abusive parents, but who protects children from the abuses of the system? Just last month the California Court of Appeal, Fourth Appellate District in *Steers v. Young* 95 Daily Journal DAR 12547 urged that the application of absolute immunity in child abuse cases receive the earnest reexamination of the Legislature.

This bill, like most, is less than perfect but injects into a troubled system a degree of accountability that will continue to protect child protection workers from all but malicious acts. It will give the zealous

and honest child protectors essentially the same qualified immunity that protects police officers in the honest performance of their duties.

The bill would be improved by a pleading hurdle requiring a preliminary showing of probability that the plaintiff will prevail. In the absence of such a pleading hurdle, I would hope that conscientious juvenile court judges will compel the attendance of the social worker and test the evidence where it seems appropriate, consistent with needed confidentiality, rather than relying exclusively upon the written record. Also, the bill on its face has exclusive application to juvenile court social workers and child protection workers, and does not apply to judges or prosecutors or their employees acting at their direction and within the scope of their authority.

The fact that the bill might have been improved by an explicit statement to that effect, as well as by the inclusion of a pleading hurdle, is not sufficient reason to withhold my signature from a needed reform.

Cordially,

/s/ Pete Wilson
PETE WILSON

GOVERNOR PETE WILSON •
STATE CAPITOL • SACRAMENTO, CALIFORNIA 95814

AB 1353

Date of Hearing: April 19, 1995

ASSEMBLY COMMITTEE ON JUDICIARY
Phillip Isenberg, Chair

AB 1355 (Knowles) – As Introduced: February 23, 1995

KEY ISSUE: SHOULD THE *ABSOLUTE* PROSECUTORIAL IMMUNITY FROM CIVIL SUIT ENJOYED BY JUVENILE COURT SOCIAL WORKERS AND CHILD PROTECTION WORKERS AUTHORIZED TO INITIATE INVESTIGATIONS OR PROCEEDINGS IN JUVENILE COURT BE LIMITED TO THE *QUALIFIED* CIVIL IMMUNITY ENJOYED BY PEACE OFFICERS?

BACKGROUND

History. California courts apply the same absolute prosecutorial immunity enjoyed by prosecutors to social workers, and interpret it to include their investigations and decisions to intervene in child abuse cases. They cite as justification that, absent such protection from lawsuits, the willingness of social workers to intervene to protect a child endangered by child abuse would diminish due to fear of retaliatory suits [*Jenkins v. County of Orange* (1989) 212 C.A.3d 278, 287]. Federal courts have also extended absolute immunity from civil rights suits to social workers [*Myers v. Contra Costa Co. Dept. of Social Services* (9th Cir. 1987) 812 F.2d 1154].

By contrast, peace officers enjoy only a qualified immunity from civil liability, which shields them from liability for actions they take in enforcing the law, but only for decisions made in the good faith exercise of their official responsibilities. Their actions must be found to have been "objectively reasonable." [*Sellers v. Procunier* (9th Cir. 1981) 641 F.2d 1295, 1300; *Pierson v. Ray* (1967) 386 U.S. 547].

* * *

There have been several unsuccessful attempts over the past few years to establish some form of liability for social workers in dependency cases – AB 2140 (Honeycutt) and SB 1790 (Johannessen) in 1994; AB 1837 (Frizzelle) and AB 2859 (Frizzelle) in 1990; and AB 2394 (Frizzelle) in 1992. SB 41 (Johannessen) is presently before the Senate Judiciary Committee.

Facts. A chasm lies between the differing facts presented by proponents and opponents, indicating deep and emotional convictions about the subject matter:

1) In a letter to Assembly Public Safety Committee members, the 1992 San Diego County Grand Jury expressly called for legislation changing the immunity provisions governing social workers in the child abuse system, citing "an inherent bias in the system" towards intervention and removing children from the home, citing the "unwillingness of Children's Service Bureau staff, from line to administrative, to listen to opposing views to the point of being hostile and threatening," and citing, also, evidence of social workers "so obsessed

with molestation scenarios that they were unable to maintain even a semblance of objectivity."

* * *

1) *Author's Statement.* "Social workers now have a civil immunity which surpasses the civil immunity of anyone else in our nation; even presidents, legislators and prosecutors are accountable to the political process and the consent of the governed. Currently there does not exist any effective check upon the arbitrary power or absolute immunity of social workers. Such a situation is antithetical to the American political philosophy and history of a system of accountable government power."

As an example of the kind of harm that social workers who are unaccountable for their actions can cause, the author cites the *Alicia Wade* case in San Diego:

> Eight-year old Alicia was abducted through her bedroom window, raped, then returned to her room. In spite of the fact that several young girls had been abducted and raped in a similar manner in that area, the social worker and county decided that Alicia's father was the perpetrator. Alicia was removed from her family and placed in foster care.
>
> For 13 months, Alicia insisted that a stranger, and not her father, was responsible. Alicia's first foster mother believed her and, as a result, Alicia was removed from her care and placed with another

> foster family who was "more appropriate." Finally, after much interviewing and coaching by the social worker and second foster mother, Alicia recanted and named her father.
>
> Alicia's mother was hospitalized and near-suicidal. Her older brother was ostracized and tormented by classmates and neighbors. Her father went through hell. In spite of the father's urging that the county look to the man accused of the other rapes, no one considered it an option and no one DNA-tested semen stains on Alicia's underwear until the point at which the Wade's paternal rights were being terminated and Alicia freed for adoption by her current foster parents – almost two years after the rape occurred.
>
> When the DNA tests finally were performed, they excluded the father and matched the man in jail for the other rapes.

2) This committee received many letters from private citizens' urging passage of the bill to assure accountability on the part of social workers. Some were identical letters drafted as part of a concerted campaign and merely signed by individuals. But many others indicated deep thought and conviction, and demonstrated the writers had taken time to carefully consider the twin concerns of protecting children from abuse while also protecting families from abuse from the legal

system. Those letters echo sentiments expressed by the 1992 San Diego Grand Jury:

> "There is concern over the system's tendency to become numb to the impact these cases have on children and their families; to lose touch with the pain and difficulty of having children removed from the family home and placed in another setting. Court time and real time are worlds apart, so that while a case drags on from week to week and month to month, the agony of separation continues . . . While Court cases often require lengthy investigation and preparation to ensure due process of law to all involved, it must never be forgotten that these cases are ultimately about living, breathing human beings."

3) The Committee also received a copy of the 1993 Santa Clara County Grand Jury Report, which acknowledged that progress had been made by that county's children's services department, but found major areas in need of attention, including checks and balances relating to internal processes within the department, and a noticeable absence of management and individual accountability in decision-making. They noted "that sometimes it does not take much of an allegation to land a child into the system" and "once you are in the system you are in for life."

* * *

Judicial Council of California Civil Jury Instructions (CACI)

Series 1500 MALICIOUS PROSECUTION

1-1500 CACI 1500

1500 Former Criminal Proceeding

[*Name of plaintiff*] **claims that** [*name of defendant*] **wrongfully caused a criminal proceeding to be brought against [him/her/it]. To establish this claim,** [*name of plaintiff*] **must prove all of the following:**

1. That [*name of defendant*] **was actively involved in causing** [*name of plaintiff*] **to be prosecuted [or in causing the continuation of the prosecution];**

[2. That the criminal proceeding ended in [*name of plaintiff*]**'s favor;]**

[3. That no reasonable person in [*name of defendant*]**'s circumstances would have believed that there were grounds for causing** [*name of plaintiff*] **to be arrested or prosecuted;]**

4. That [*name of defendant*] **acted primarily for a purpose other than to bring** [*name of plaintiff*] **to justice;**

5. That [*name of plaintiff*] **was harmed; and**

6. That [*name of defendant*]**'s conduct was a substantial factor in causing** [*name of plaintiff*]**'s harm.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] has proven element 2 above, whether the criminal proceeding ended in [his/her/its] favor. But before I can do so, you must decide whether [*name of plaintiff*] has proven the following:

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] has proven element 3 above, whether a reasonable person in [*name of defendant*]'s circumstances would have believed that there were grounds for causing [*name of plaintiff*] to be arrested or prosecuted. But before I can do so, you must decide whether [*name of plaintiff*] has proven the following:

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

1501 Wrongful Use of Civil Proceedings

[*Name of plaintiff*] **claims that** [*name of defendant*] **wrongfully brought a lawsuit against [him/her/it]. To establish this claim,** [*name of plaintiff*] **must prove all of the following:**

1. That [*name of defendant*] **was actively involved in bringing [or continuing] the lawsuit;**

[2. That the lawsuit ended in [*name of plaintiff*]**'s favor;]**

[3. That no reasonable person in [*name of defendant*]**'s circumstances would have believed that there were reasonable grounds to bring the lawsuit against** [*name of plaintiff*]**;]**

4. That [*name of defendant*] **acted primarily for a purpose other than succeeding on the merits of the claim;**

5. That [*name of plaintiff*] **was harmed; and**

6. That [*name of defendant*]**'s conduct was a substantial factor in causing** [*name of plaintiff*]**' s harm.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] **has proven element 2 above, whether the criminal proceeding ended in [his/her/its] favor. But before I can do so, you must decide whether** [*name of plaintiff*] **has proven the following:**

[*List all factual disputes that must be resolved by the jury.*]

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 3 above, whether [***name of defendant***] had reasonable grounds for bringing the earlier lawsuit against [him/her/it]. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.*]

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

1520 Abuse of Process –
Essential Factual Elements

[*Name of plaintiff*] **claims that [***name of defendant***] wrongfully [***insert legal procedure, e.g., "took a deposition"***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. That [*name of defendant***] [***insert legal procedure, e.g., "took the deposition of [name of deponent]"***];**

2. That [*name of defendant***] intentionally used this legal procedure to [***insert alleged***

improper purpose that procedure was not designed to achieve];

3. That [*name of plaintiff*] **was harmed; and**

4. That [*name of defendant*]**'s conduct was a substantial factor in causing** [*name of plaintiff*]**'s harm.**

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**SUPERIOR COURT OF
THE STATE OF CALIFORNIA**

COUNTY OF ORANGE

DEANNA FOGARTY-HARDWICK, Plaintiff, v. COUNTY OF ORANGE et al., Defendants.	Case No. 01CC02379 Judge Ronald L. Bauer, Dept. CX-103 OPPOSITION TO MOTION FOR ATTORNEYS' FEES ON APPEAL; DECLARATION OF ROBERT M. DATO; EXHIBIT Date: Dec. 13, 2010 Time: 10:30 a.m.

INTRODUCTION

Defendants County of Orange, Marcie Vreeken, and Helen Dwojak (collectively the County) do not challenge the total number of hours claimed by plaintiffs' various attorneys on appeal (with the exception of one task). However, the County does challenge the hourly rates requested by the ten lawyers who worked on the appeal. * * * Here, the Court of Appeal determined that the opinion in this case would not be published. The opinion thus has no precedential value. The Court of Appeal also reversed the injunction against the County, thereby removing any impact this case has beyond the parties involved.

* * *

B. The Court of Appeal's Unpublished Opinion.

This court is no doubt familiar with the Court of Appeal's opinion, which affirmed all aspects of the monetary judgment. However, the court ordered that the opinion was not to be published in the Official Reports. In addition, the Court of Appeal reversed both aspects of the injunction that had been issued against the County:

* * *

IV

No Lodestar Should be Awarded.

* * *

The Court of Appeal's opinion was not unprecedented. It was "nonprecedented." The opinion was not

certified for publication. * * * The Court of Appeal here concluded that the resolution of the legal issues in this case were not sufficiently novel to warrant publication. The opinion cannot be cited as legal precedent. In addition, the Court of Appeal reversed the injunction against the County, so this case will not have a legal impact beyond the parties.

"*[D]ifficult issues and a skilled adversary. . . .*"

However difficult the issues may have appeared * * * the fact is that the Court of Appeal determined they were not sufficiently difficult or novel to warrant publication of the opinion.

* * *

Dated: November 29, 2010

BUCHALTER NEMER, PC
BEAM, BROBECK, WEST, BORGES & ROSA LLP

By: /s/ Robert M. Dato
Robert M. Dato

Attorneys For Defendants
COUNTY OF ORANGE,
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HELEN DWOJAK

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

JONATHAN M., Petitioner; v. THE SUPERIOR COURT OF ORANGE COUNTY Respondent; ORANGE COUNTY SOCIAL SERVICES AGENCY et al., Real Parties in Interest.	G043674 (Super. Ct. Nos. DP017854, DP017855, DP017856) OPINION

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Jane Shade, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petition granted. Stay issued.

Lawrence A. Aufill, under appointment by the Court of Appeal, for Petitioner.

Nicholas S. Chrisos, County Counsel, and Karen L. Christensen, Deputy County Counsel, for Real Parties in Interest.

Law Office of Harold LaFlamme and Yana N. Kennedy, for Minors.

INTRODUCTION

In this dependency case, Jonathan M. seeks writ relief from an order reducing his visitation with his children from once per week to once per month, made at the same time the court terminated the reunification efforts between his wife and the children and set the matter for a Welfare and Institutions Code section 366.26 selection and implementation hearing.[1] Jonathan argues the court abused its discretion in reducing the amount of visitation, because the children enjoyed their visits with him, and the decision to terminate mother's reunification services in no way related to the frequency of his visitation. He suggests the court's reduction of visitation in anticipation of the selection and implementation hearing harmed his ability to prove he enjoyed the sort of beneficial relationship with his children that might justify an

---

[1] All further statutory references are to the Welfare and Institutions Code.

exception to the presumption favoring adoption as the permanent plan for these children.

We conclude Jonathan is correct, and the trial court abused its discretion. There is no evidence Jonathan's visitation schedule was presenting a problem for the children, and no suggestion of any changed circumstances that would have militated in favor of a reduction in that visitation. As far as we can discern, the only change was that *mother's* reunification period ended. That change did not, in and of itself, have any effect on Jonathan's visitation.

Moreover, an order reducing visitation, made in conjunction with the order setting a selection and implementation hearing is particularly problematic, because establishing the existence of a beneficial relationship between parent and child which outweighs the perceived benefits of adoption, is one of the few arguments available to stave off termination of parental rights when a dependency case gets to the permanency stage. And reducing visitation, especially by 75 percent, clearly undermines a parent's ability to make such an argument.

We consequently conclude the court abused its discretion by reducing Jonathan's visitation, for no apparent reason other than anticipation of the selection and implementation hearing. We reject Jonathan's suggestion the decision may have been "punitive" in nature. It appears instead to be an attempt at expediency and a reflection of the tendency to lump the parents together in dependency cases. But in either

case, it was erroneous, and we consequently grant Jonathan's petition for writ relief.

In light of the tight timeframe between the filing of Jonathan's writ petition (June 18, 2010) and the court's scheduled selection and implementation hearing (September 1, 2010), we note there is, as a practical matter, little relief we can offer in the absence of an order staying the section 366.26 hearing, which Jonathan has requested. We consequently grant that stay for a period of three months, i.e., until December 1, 2010, and remand the case to the juvenile court with directions to reinstate Jonathan's prior weekly visitation schedule during that period, and to reschedule the selection and implementation hearing for a date after December 1, 2010.

FACTS

The children involved in this case are Jonathan, Jr., (age five), Anabel (age three), and Nathan (age 22 months.) They were detained in November of 2008, after both parents were taken into custody on various charges relating to a series of robberies and gang crimes.

In a highly disturbing turn of events, SSA filed an amended petition adding a count under section 300, subdivision (d), alleging that since Jonathan, as an adult, had sexual relations with the children's mother when she was a minor, he had "sexual[ly] abuse[d]" her, and, as a consequence, the children were "at risk of sexual abuse by [him.]" To be clear,

Jonathan is less than two years older than the children's mother, and thus if he was an adult when they were having sex, she was at least 16 years old. We fail to see the connection between that conduct and an increased likelihood he would sexually abuse his children who, at that point, were all under the age of five.[2] The purported risk seems especially unlikely when we consider the fact that at that point, SSA was reporting Jonathan would be incarcerated "*longer than 50 years*." Indeed, that anticipated length of incarceration was the sole basis of the recommendation in SSA's report that he be denied reunification services.

---

[2] What the record shows is that the children's mother reported to the social worker she had started dating Jonathan when she was 12 years old (he would have been no more than 14 years old); she had their first child, Jonathan Jr., when they were both minors; and they began cohabitating when she was 15 years old (and he no more than 17 years old.) Mother explicitly denied any concern that the children were at risk of sexual abuse by Jonathan, and noted she had worked with a social worker during the time she was pregnant with Jonathan, Jr. Her suggestion that SSA was well-aware of the facts underlying its claim of "sexual abuse" at the time of the events in question is supported by SSA's own records, which reflect that both Jonathan and the children's mother were fairly extensively "involved with" SSA as minors. Moreover, SSA explicitly acknowledges it had received a report back in March of 2004 that the mother "was staying with her boyfriend," and in May of 2004, it was aware she was "pregnant as a result of voluntary sexual relations with her boyfriend. . . ." Jonathan, Jr., was born five months later. Apparently, it did not occur to SSA to suggest Jonathan might be guilty of "sexual abuse" at that time.

Less than two weeks later, both the children's mother and Jonathan submitted to jurisdiction on an amended petition which included only a "failure to protect" allegation under section 300, subdivision (b), and a "no provision for support" allegation under section 300, subdivision (g). In connection with that agreement to submit, SSA simply dropped the explosive "sexual abuse" allegation.

Ultimately, mother was offered reunification services, but they were denied to Jonathan.[3] Moreover, from the inception of the case, and throughout the 18-month period during which reunification services were provided to mother, SSA consistently recommended that Jonathan receive only monthly visitation with the children. However, the court granted Jonathan's request for weekly visitation quite early in the case, and continued to order that level of

---

[3] Welfare and Institutions Code section 361.5, subdivision (e)(1) provides in pertinent part: "If the parent or guardian is incarcerated or institutionalized, the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services, the likelihood of the parent's discharge from incarceration or institutionalization within the reunification time limitations described in subdivision (a), and any other appropriate factors."

frequency throughout the 18-month reunification period.

SSA's written report filed in connection with the 18-month hearing said nothing at all negative about Jonathan's visitation. To the contrary, it reflected only that "[t]he children report that they like to see their daddy," and that "Jonathan [Jr] explained . . . he talks to his dad on the phone." Moreover, the report did not technically include any "recommendation" concerning the frequency of Jonathan's visitation. Instead, it focused exclusively on its recommendation that reunification services be terminated for mother, and the matter be scheduled for a selection and implementation hearing. The report did incorporate a case plan, which reflected a *monthly* visitation schedule for Jonathan, but without proving any explanation as to why that might be more appropriate than his then-current weekly schedule.

At the hearing, Jonathan's attorney objected to monthly visitation schedule included in the case plan, noting that "father has been receiving weekly visitation with those children. They have been appropriate. There have been no concerns. I believe there's no detriment [caused by] the visits of the children and father. So I'd be asking for those visits to remain one time a week." In response to that objection, the children's attorney pointed out that "as to father's visitation, this is the wind-down period, and these children are very young. They are little. I am requesting that the court adopt the recommendation. I think when the court considers the facts as a whole, the ages of

the children, their need for permanency, that the recommendation as set forth by the agency is more appropriate." SSA offered no argument on the point.

As part of its ruling at the conclusion of the hearing, the court ordered that Jonathan be given only monthly visitation. In doing so, the court indicated a concern that "if [father were] moved to a state prison, . . . [he] might end up in some location far away in Northern California, [then] I'd have a concern about being able to transport the children in a car maybe eight hours each way. [¶] So what I'm going to do is order your visitation one time per month while father's in custody in Orange County jail.

Thereafter, I'll be happy to make any appropriate orders depending upon where father may be placed if he his [sic] located somewhere else. And we'll just make that determination at that time."

I

Before we address the visitation issue, a comment is in order. As we noted above, SSA filed an amended petition in this case, alleging that Jonathan posed a significant risk of sexual abuse to his small children, based upon the bare allegation he had engaged in sexual intercourse with their mother at a point when she was no younger than 16 years old, and he was not quite two years older. Moreover, SSA made this allegation at a time when Jonathan was in jail, and it was otherwise on record as stating there

was a substantial likelihood he would *remain incarcerated for as long as 50 years.*

This kind of pleading undermines confidence in the system. It damages the reputation of the Social Services Agency and causes parents to suspect the system is prejudiced against them, and social workers will use any excuse they can think of – whether credible or not – to deprive them of the custody of their children.

It has to stop. No one in government has a more important job than the employees of the Social Services Agency; no one has a more critical task than the protection of our children. It is essential to our society that this charge be carried out with compassion and fairness. Alleging that a father is a danger to his preschool children because he had sex with their mother when they were teenagers is not calculated to improve the credibility of the people who daily shoulder this burden.

As reflected in the facts underlying the other counts alleged against the parents in this case, SSA had perfectly legitimate reasons for requesting that the court take jurisdiction over these children. If SSA was concerned that those *legitimate* reasons might not be deemed persuasive enough by the court, its response should not have been to throw in an additional "sexual abuse" count – which might be interpreted as an attempt to frighten the parents into submitting to jurisdiction on the other counts.

Instead, it should have invested more consideration into the reasons it had.

With great power comes great responsibility. SSA has great power. The facts of this case and others brought to us in recent months (*see, e. g., Fogarty-Hardwick v. County of Orange* (G039045, June 14, 2010) [nonpub. opn.], and *In re Tyler H.* (G043216, Aug. 26, 2010) [nonpub. opn.]) suggest the agency has somehow temporarily detoured from its long tradition of exercising that power wisely and responsibly. We look forward to its return to that tradition.

II

Turning to the visitation issue, we start with the proposition that the court has continuing authority to make orders for parental visitation as long as the court retains jurisdiction over the case. (See, e.g., section 366.26, subd. (c)(4)(C).) Implicit in that authority is "the authority to modify the terms of visitation if the conditions warrant it." (*In re Megan B.* (1991) 235 Cal.App.3d 942, 952, recognized as superseded by statute on other grounds in *In re Steven H.* (1992) 6 Cal.App.4th. 1752)[4] We review such modifications on an abuse of discretion standard. (*Ibid.*)

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[4] In *In re Steven H.*, the court determined that a challenge to the juvenile court's order modifying visitation, where that order is made contemporaneously with an order terminating reunification services and referring the case to a selection and implementation hearing, must be brought by writ petition,

(Continued on following page)

In this case, we have no choice but to conclude the court abused its discretion. The court had previously ordered weekly visitation and the only evidence pertaining to Jonathan's visitation at the 18-month hearing was that the children *enjoyed* it. There was no evidence from which the court could even *infer* that weekly visits were proving problematic or disruptive in their lives. No party so much as suggested that. Instead, the only argument made against continuing Jonathan's visitation on a weekly basis was that the children had a need for "permanency" and the case had entered its "wind-down phase."[5] Well, the case may have entered its wind-down phase – or it may not have. There's no way to know that without prejudging the outcome of the selection and implementation hearing – i.e., whether the court would order termination of parental rights. Because if the court did ultimately decide, at the selection and implementation hearing, that termination of parental rights was not the appropriate course, this case could live on for several more years, with an order of guardianship or long term foster care for these children.

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rather than appeal. (Accord, *Anthony D. v. Superior Court* (1998) 63 Cal.App.4th 149.) Jonathan did so in this case.

[5] Counsel also mentioned the fact that "these children are very young" as an additional basis for limiting visitation with Jonathan. But these children were certainly not getting any younger than they had been when the court had ordered weekly visitations with Jonathan. So presumably, their relative youth was not going to be any more a problem going forward than it had been.

And that is the real problem. It is the very purpose of the selection and implementation hearing – which the court had ordered would take place *in the future* when it terminated reunification services – to ascertain whether the case is "winding-down" to an order terminating parental rights, or whether it will proceed on to some other permanent plan. The court could not, therefore, approach that hearing on the assumption it already knew what the outcome would be. Consequently, the assertion this case is "in the wind-down phase" is the very worst basis for limiting visitation in the period before the selection and implementation hearing. The perniciousness of such an argument is particularly obvious when we consider that one of the few arguments a parent can make to avoid termination of parental rights – which is otherwise the outcome favored by statute in the case of children deemed "adoptable" – is the assertion that he or she enjoys such a significant bond with a child that the harm of severing that relationship would outweigh the benefits of freeing the child for adoption into a new family. (Section 366.26, subd. (c)(1)(B)(1).)[6] A parent's ability to demonstrate such a bond can only be undermined by a severe reduction in his or her contact with the child during the months preceding the selection and implementation hearing.

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[6] Section 366.26, subdivision (c)(1)(B)(1), provides for an exception to termination of parental rights when doing so would be detrimental to the child because "The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

To be clear, we are expressing no opinion on the likelihood Jonathan would be able to prove the existence of such a bond in this case, and no opinion on the broader issue of whether these children are likely to be freed for adoption. Those issues are not before us, just as they were not before the juvenile court at the hearing in which it terminated mother's reunification services. It is for that very reason that the court should not have considered the potential "wind-down" of this case as a basis for reducing Jonathan's visitation. To the extent its decision was based upon such a consideration, it was premature.

Because the court itself gave no explanation for its decision to reduce Jonathan's visitation – and the only comment it made on the issue related explicitly to what *might happen in the future*, i.e., when Jonathan is transferred to state prison – SSA has attempted to defend the decision by speculating as to what justifications the court *might* have relied upon in light of the record in this case. We find none of them persuasive.

SSA first suggests the court might have decided to reduce Jonathan's visitation because the children had recently been moved to a new placement, because Jonathan, Jr., "did not react well to change," and because some of his stress issues "might result from overhearing adults discussing his care or placement or other things." But only one of these factors is arguably related to Jonathan's visitation schedule, and it would seem to militate *against* changing it. There is nothing to suggest that the children's new

placement made visitation with Jonathan more difficult, or that the new caretakers had registered any objection; there is no evidence that Jonathan, Jr., was hearing adults "discussing his care or placement or other things," during visits with Jonathan; and of course, if Jonathan, Jr., is resistant to change, then a *change* in visitation with his father would be likely to make things worse, not better.

SSA also argues there is evidence the children suffered "'fallout'" from visits which it concedes "appear to be with Mother," but nonetheless relies upon that "'fallout'" to suggest (without actually explaining why) the court might have concluded that reducing visitation with Jonathan would be "in their best interests." Of course, such an inference seems particularly unreasonable when we consider the fact that the "fallout" from the children's visits with mother did not cause the court to reduce visitation *for her*.

Finally, SSA suggests that the fact its reports reflect the children expressed a desire to "live with and visit" their mother, while only expressing enjoyment of their visits with Jonathan, would allow the court to infer they didn't really *want* to visit Jonathan. As SSA expresses it, "[t]he juvenile court could have viewed the evidence to support a conclusion *that enjoying visits was not the same as wishing to have the visits*." (Italics added.) We disagree. This kind of legalistic, post-hoc parsing is unbecoming a government agency that deals with children on a regular basis. When it comes to small children, enjoying it and wanting it are the same thing.

Nor do we think the fact SSA's reports reflect the children's desire to "live" with their mother, while only expressing their enjoyment of visiting Jonathan, is significant. The stated goal of the dependency proceeding, until the 18-month hearing, was for the children to be reunified with their mother and resume living with her. Presumably the children's view of that goal would be considered of some significance to the social worker. But as there was never any similar goal vis-à-vis Jonathan, and since the expectation was that he would remain incarcerated for many years, there was no reason to assess, let alone document, the children's desire to resume living with him.

Because we find none of the evidence cited by SSA sufficient to support the court's order reducing Jonathan's visitation, and we can otherwise discern no reasonable basis for the court's decision to do so in the period leading up to the selection and implementation hearing, we conclude the court abused its discretion in making that order.[7]

Unfortunately, we can do nothing to restore Jonathan's visitation retroactively. All we can do is attempt to mitigate whatever harm was caused by directing what should happen from this point.

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[7] We acknowledge, however, that the court's concern about Jonathan's potential transfer to a distant prison, and the practical effect such a move would have on the ability to facilitate visitation, is a valid one. If and when that happens, any visitation order then in effect would have to be reconsidered.

Consequently, we grant the petition for writ of mandate. We reverse the visitation order and direct the court to reinstate Jonathan's previous visitation of one time per week, effective immediately and continuing for a three month period ending December 1, 2010. The permanency hearing is stayed until December 1, 2010. The juvenile court is directed to hold the selection and implementation hearing after that date.

Petition for writ of mandate is granted.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.